(22,487)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 208.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND EDWARD JOHNSON, PLAINTIFFS IN ERROR,

vs.

ALBERT M. DOWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 12, 1912.

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1 & 2 In the Supreme Court of the State of Kansas.

No. 16745.

ALBERT M. DOWELL, Appellee,
v.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, and ED. JOHNSON, Appellants.

Be it remembered, That on the first day of September, 1909, the appellants perfected an appeal in the above entitled case, from the judgment of the District Court of Seward county, Kansas, rendered June 25th, 1909, to the Supreme Court of Kansas, by filing with the clerk of said District Court a notice of appeal, with an acknowledgement of service by the appellee. And thereafter, the clerk of said District Court transmitted to the clerk of the Supreme Court of Kansas, certified copies of the notice of appeal and judgment appealed from, which were received and filed by said Clerk of the Supreme Court on November 2nd, 1909. That afterwards, in due time, the appellants filed with their brief on the case, specification of Errors. That subsequent to the rendition of the final judgment by said Supreme Court in said case, and after the allowance of a writ of error, the original record was transmitted by the clerk of said District Court to the clerk of said Supreme court, for the purpose of incorporating a copy thereof in the transcript to be forwarded to the Clerk of the supreme court of the United States in response to the commands of the writ of error.

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3–7 In the Supreme Court of Kansas.

No. 16745.

ALBERT M. DOWELL, Appellee,
v.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, and ED. JOHNSON, Appellants.

Specification of Errors.

The appellants says that in the record and proceedings in said district court, there is manifest error in this:—

1. That said court erred in refusing to grant the petition of the Railway Company for a removal of said cause to the United States Court for trial.

2. That said court erred in retaining jurisdiction of said cause.

3. That said court erred in refusing to sustain the demurrers of the appellants and each of them to the evidence of the appellee.

4. That said court erred in refusing to direct a verdict in favor of the appellants and each of them.

5. That said court erred in refusing to uphold the release executed by the appellee.

6. That said court erred in the admission and submission to the jury of improper and prejudicial evidence offered by the appellee.

7. That said court erred in refusing to grant the appellants and each of them new trials.

8. That said court erred in rendering judgment for the appellee and against the appellants, or either of them.

9. That the verdict of the jury was excessive, and the result of passion and prejudice.

M. A. LOW,
PAUL E. WALKER,
Att'ys for C., R. I. & P. Ry. Co.
V. H. GRINSTEAD,
Att'y for Ed. Johnson.

* * * * * * *

8 (Copy.)

* * * * * * *

In the District Court of Seward County, Kansas.

ALBERT M. DOWELL, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, and ED. JOHNSON, Defendants.

Petition.

Plaintiff for his cause of action against defendant comes now and states:

First. That plaintiff is a bona fide resident citizen of Seward County, Kansas, and was prior to the filing of this suit and at all times hereinafter mentioned; that defendant is a railway corporation duly incorporated under and by virtue of the laws of the states of Illinois and Iowa, and is now, and was at all the times hereinafter mentioned engaged in the operation of a line of railway as such corporation between the City of Chicago in the State of Illinois and the town of Texhoma in the Territory of Oklahoma, including a line of road running through said Seward County, Kansas.

Second. That on or before the 21st day of January, 1907, this plaintiff was in the employ of said defendant as a common laborer and it was his duty among other duties as such employé, to remove cinders and other debris from the tracks and yards maintained by defendant in the town of Liberal, Seward County, Kansas, that on said date while this plaintiff was in the proper and necessary discharge of his duties and was removing a shovel full of cinders from one of said tracks the agent and servant of defendant, to-wit, one

of its engineers, without warning to this plaintiff of any kind
9 and without any signal and without ringing the bell or blowing the whistle of said engine to warn plaintiff of its approach, backed the engine then in use by said engineer over this plaintiff, crushing, mangling and bruising this plaintiff's legs so that it became and was necessary to amputate his right leg above the knee and his left leg below the knee, rendering plaintiff a hopeless cripple for life, and his said injuries are permanent, and in consequence of said injuries plaintiff has suffered and will suffer during his natural life great pain of body and anguish of mind and will be unable to earn a liv-lihood by his own efforts as plaintiff's only means of earning a liv-lihood was by manual labor.

Third. Plaintiff further alleges that said engineer Ed Johnson was at all the times herein mentioned and still is a bona fide resident and citizen of Seward County, Kansas, and that this plaintiff was at all said times likewise a resident and citizen of the County of Seward, State of Kansas.

Plaintiff further says that said engineer Ed Johnson was incompetent, unskilled and unfit to discharge the duties as an engineer at the time he was employed to discharge such duties by the defendant Railway Company, as said Railway Company well knew, and that he has been unskilled, unfit and incompetent as the defendant Railway Company well knew, but all of which this plaintiff was at all times ignorant.

10 Plaintiff says further, that said engine above mentioned was old and worn, defective and unsafe in that it leaked steam into its cylinder and would not stand when left alone, but would move without the intervention of human or outside agency, and the appliances and machinery of said engine for starting and stopping same were so defective that the same would start and stop without reference to said machinery and would not respond to the operation of said machinery; that said engine was without proper, sufficient or safe driving wheel brakes, all of which was well known to the defendants at all the times herein mentioned, but all of which the plaintiff was at all times ignorant.

Fourth. That the injury to plaintiff was the direct and proximate result of the unfitness and incompetency of the defendant, Ed Johnson, and of the negligence and carelessness of said Ed Johnson in carelessly, recklessly and needlessly running said engine upon and against the said plaintiff, and of the careless failure of said Ed Johnson in neglecting to use proper precaution to observe and avoid running upon and injuring the said plaintiff at the time and place in question, and in the carelessness of the defendant Railway Company in employing the said Ed Johnson as engineer and in retaining him and allowing him to act as engineer at the time and place in question, and in the carelessness of the defendant Railway Company in knowingly retaining and using said defective engine at said time and place, and in carelessly failing to take proper precaution to prevent injury to said plaintiff at said time and place while engaged in the discharge of his duty as employé of said de-

fendant Railway Company; and each and every act of omis-
11 sion and commission of the defendants and of each of them as above, were the joint, proximate and concurrent cause of said injury, and each of said acts of the said defendants materially, concurrently and jointly contributed to the injuries of said plaintiff, and plaintiff says that he was without fault or negligence in the premises.

Fifth. Plaintiff says that said engine was being used by the defendants at the time in and about the carrying on of inter-state traffic between the State of Illinois and the Territory of Oklahoma.

Sixth. Plaintiff alleges that at the time of the injury he was forty-six years of age, strong and able-bodied, and earning about $75.00 per month, but as a result of said injury he has been made a hopeless cripple for life, incapacitated from performing manual or other kind of labor, and caused to suffer great and permanent, physical and mental pain, all to his damage in the sum of Forty Thousand Dollars.

Seventh. Plaintiff states that on the 5th day of August, 1907, he served upon the defendant Railway Company a notice of the time and place and nature of his injury, a copy of which said notice with proof of service is attached hereto, marked Exhibit "A" and made a part hereof.

Wherefore, Plaintiff prays for judgment against said defendant for $40,000.00, the amount of his damages so as aforesaid sustained and for costs.

WRIGHT & MACY,
Attorneys for Plaintiff.

Filed Feb'y 15th, 1908.

H. W. LANE,
Clerk Dist. Court.

12–16 EXHIBIT "I."

LIBERAL, KANSAS, *August* 5, 1907.

To The Chicago, Rock Island and Pacific Railway Company:

You are hereby notified that Albert M. Dowell has a claim against your Company for damages on account of injuries received by said Albert M. Dowell, which said injuries were received on the 21st day of January, 1907, and which resulted in the loss of both legs of said claimant; that said injuries were received on the above mentioned date in the yards of your Company at Liberal, Kansas, and was the result of being run over by a switch engine in the said yards on said date while the said Albert M. Dowell was shovelling cinders in the yards of said Company.

ALBERT M. DOWELL,
By WRIGHT & MACY, AND
HYDE & STALCUP,
Attorneys.

STATE OF KANSAS,
County of Seward, ss:

F. S. Macy of lawful age, being duly sworn on his oath deposes and says that on the fifth day of August, 1907, he personally served the above notice upon The Chicago, Rock Island and Pacific Railway Company at Liberal, Seward County, Kansas, by delivering a true copy of the same to F. Noyes, local agent to sell tickets and station-keeper of such company at the depot of said Company in Liberal, Seward County, Kansas, that said notice was served on behalf of the above named claimant; that said Chicago, Rock Island and Pacific Railway Company has designated no person upon whom service can be had in said Seward County, Kansas, as provided in Section 4499 of the General Statutes of 1901 of the State of Kansas, or Section 4941 of the General Statutes of Kansas of 1905.

F. S. MACY.

Subscribed and sworn to before me this 13 day of February, 1908.

L. A. ETZOLD,
County Clerk.

* * * * * * *

17 (Copy.)

In the District Court of Seward County, Kansas.

ALBERT M. DOWELL, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and ED JOHNSON, Defendants.

Petition for Removal to the United States Circuit Court.

Your petitioner, The Chicago, Rock Island and Pacific Railway Company respectfully shows:

1. That this action was begun in the District Court of Seward County, Kansas, on or about the 15th day of February, 1908, by plaintiff by filing in the office of the Clerk of said Court a petition, and by service upon the defendant, your petitioner, of a writ of summons; that said cause is still pending and undetermined, and that the term of said court to be begun and held in the City of Liberal, Seward County, Kansas, on the Wednesday after the third Monday in April, 1908, being April 22nd, 1908, is the first term at which said cause may be tried; that said cause has not yet been tried, and that the defendant, The Chicago, Rock Island and Pacific Railway Company, has not answered or pleaded to plaintiff's petition, and is not required under the laws of this State, or the rules of said court to answer or plead to plaintiff's petition until the 16th day of March, 1908.

2. That this action is founded upon the alleged liability of the defendants for damages resulting from personal injuries to the plaintiff

on or about the 26th day of January, 1907, alleged to have been caused by the negligence of the defendant, The Chicago,
18 Rock Island and Pacific Railway Company, and Ed Johnson, an employé of said defendant, The Chicago, Rock Island and Pacific Railway Company; that said cause of action is of a civil nature, and that the plaintiff in his petition claims the sum of $40,000.00 as damages from the defendants, and that the matter in dispute in said controversy exceeds exclusive of interest and costs the sum or value of $2,000.00 to-wit: $40,000.00.

3. That this action involves a controversy between citizens of different states. That the plaintiff, Albert M. Dowell was at the time of the commencement of this action, and at all times since has been, and now is a citizen and resident of the State of Kansas, and not a citizen or resident of the State of Illinois or the State of Iowa. That the defendant, The Chicago, Rock Island and Pacific Railway Company is a corporation duly organized under and by virtue of the laws of the States of Illinois and Iowa, having its principal place of business in the City of Chicago, in said State of Illinois, and was at the time of the commencement of this action, ever since has been and still is a citizen of the State- of Illinois and Iowa and not a resident or citizen of the State of Kansas.

4. That this action involves a controversy which is wholly between citizens of different states, as aforesaid, that the alleged cause of action is a separable controversy which can be fully determined between the plaintiff and your petitioner, and the whole subject matter of the suit is capable of being finally determined between them and complete relief afforded as to the separate cause of action
19 without the presence of the other party originally made a party to this suit, as the plaintiff seeks to recover against your petitioner solely for the negligence of the defendant, Ed Johnson. And your petitioner, The Chicago, Rock Island and Pacific Railway Company says that the said Ed Johnson was joined as defendant in this action by the plaintiff, for the sole and fraudulent purpose of defeating and preventing this defendant, your petitioner, from removing this action from the State Court in which it is now pending to the United States Circuit Court for the District of Kansas, Second Division, and for the sole and fraudulent purpose of defeating said jurisdiction of the said United States Circuit Court in this action.

5. That this action involves a controversy which is wholly between citizens of different states, as aforesaid; that the alleged cause of action is a separable controversy which can be fully determined between the plaintiff and your petitioner, and the whole subject matter of the suit is capable of being finally determined between them, and complete relief afforded as to the separate cause of action without the presence of the other party made a party to this suit, as the petition of the plaintiff does not state a cause of action against the defendant, Ed Johnson, and he was made a defendant in this suit for the sole and fraudulent purpose of defeating your petitioner from removing this action, as aforesaid, to the United States Circuit Court for the District of Kansas, Second Division; that the plaintiff did not have at the time of the institution of this suit, nor has he

now, any cause of action against the defendant, Ed Johnson or any reasonable ground upon which to base a cause of action, or upon which to base a recovery against the defendant, Ed Johnson;
20 that the defendant, Ed Johnson, cannot in any sense be made a proper party defendant in said cause and cannot in any way be subject to a judgment rendered in said cause; as said petition does not state a joint cause of action against said defendants, nor any cause of action against the defendant, Ed Johnson, and that the said Ed Johnson is a man of small means, and has no, or but little property from which a judgment against him, in this action, if such were recovered, could be collected, and that this defendant is, and was at the time of the institution of this action, entirely solvent and able to pay any debts that may exist against it, and to pay any judgment which might be recovered against it in this action; that it has a large amount of property, and more than sufficient to pay the amount sued for in this action within the jurisdiction of this Court, and according to the allegations in plaintiff's petition, any act of negligence on the part of the defendant, Ed Johnson, alleged to have produced the injury to this plaintiff, was an act of this defendant and accordingly this defendant is responsible and liable for the same.

6. Your petitioner offers herewith a bond with good and sufficient surety for entering in the Circuit Court of the United States for the District of Kansas, Second Division, the first day of its next session, a copy of the record of this action, and for paying all costs that may be awarded by said Circuit Court, if said Circuit Court shall hold that this action was wrongfully or improperly removed thereto, and also for its appearing and entering special bail in said suit, if special bail was originally requisite therein.

21 Wherefore, your petitioner prays that this action may be removed to the Circuit Court of the United States for the District of Kansas, Second Division, and that this court proceed no further herein.

M. A. LOW,
PAUL E. WALKER,
V. H. GRINSTEAD,
Attorneys for Petitioner, The Chicago, Rock Island and Pacific Railway Company.

STATE OF KANSAS,
County of Shawnee, ss:

Paul E. Walker, of lawful age, being first duly sworn, upon his oath deposes and says, that he is the Agent and Assistant General Attorney of the above named defendant, The Chicago, Rock Island and Pacific Railway Company, and as such makes and is authorized to make this affidavit; that he has read the above and foregoing petition, and knows the contents thereof, and that the averments and allegations therein are true as he verily believes.

PAUL E. WALKER.

Subscribed and sworn to before me this 2nd day of March, 1908.
[Seal affixed.] LUTHER BURNS,
Notary Public.

My commission expires April 24, 1911.

22 In the District Court of Seward County, Kansas.

ALBERT M. DOWELL, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and ED JOHNSON, Defendants.

Bond.

We, The Chicago, Rock Island and Pacific Railway Company, as principal and M. J. Grinstead and Jno. L. Hobble, as surety, are held and firmly bound unto Albert M. Dowell, the above named plaintiff, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to said Albert M. Dowell, his heirs, executors, or administrators for which payment well and truly to be made, we bind ourselves, our successors, heirs, representatives, executors, and administrators, jointly and severally, firmly by these presents.

Upon this condition:

Whereas, on or about the 15th day of February, 1908, an action was brought by Albert M. Dowell against the Chicago, Rock Island and Pacific Railway Company, and Ed Johnson, in the District Court of Seward County, Kansas, and is now pending for trial in said court, and is removable into the Circuit Court of the United States for the District of Kansas, Second Division, and by virtue of the Act of Congress in such case made and provided; and

Whereas, said The Chicago, Rock Island and Pacific Railway Company has filed its petition in said District Court for the removal of said action into the Circuit Court of the United States for

23 the District of Kansas, Second Division, now, therefore,

The condition of the above obligation is such that if the above bounden, The Chicago, Rock Island and Pacific Railway Company, or its successors, shall enter or cause to be entered in the Circuit Court of the United States for the District of Kansas, Second Division, on the first day of the next term thereof, a copy of the record of this action, and shall pay all costs that may be awarded by said Circuit Court, if said Circuit Court shall hold that this action was wrongfully or improperly removed thereto, and shall then and there enter special bail in said action, if the same were originally requisite therein, and do and perform all other things by law to be done on the removal of actions from State to United States Courts, then the above obligation to be void; otherwise to be and remain in full force and effect.

In testimony whereof, said The Chicago, Rock Island and Pacific Railway Company has caused this bond to be executed by M. A. Low, its Agent and General Attorney, and said M. J. Grinstead and Jno. L. Hobble has hereunto set *his* hand- and seal-.

Sealed with our seals and dated this 14" day of March, 1908.

THE CHICAGO, ROCK ISLAND AND
PACIFIC RAILWAY COMPANY, [SEAL.]
By M. A. LOW, *Its Agent and General Attorney.*
M. J. GRINSTEAD. [SEAL.]
JNO. L. HOBBLE.

5/22/08.

Approved,
WM. H. THOMPSON, *Dist. Judge.*

Filed March 14, 1908.
H. W. LANE, *Clerk.*

24 That thereafter and on the 22nd day of April, 1908, the said plaintiff filed his answer to defendants' Petition for Removal, which said answer is in words and figures following, to-wit:

25 In the District Court of Seward County, Kansas.

ALBERT M. DOWELL, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and ED. JOHNSON, Defendants.

Plaintiff's Answer to Defendants' Petition for Removal.

Comes now plaintiff and for answer to the petition for removal herein by the Chicago, Rock Island and Pacific Railway Company, defendant, denies all and singular each and every allegation in said petition for removal contained, except as is alleged in the plaintiff's petition herein.

Further answering herein the plaintiff denies that the defendant Ed. Johnson was joined as defendant in this action by the plaintiff for the sole and fraudulent purpose of defeating and preventing this defendant, The Chicago, Rock Island and Pacific Railway Company, from removing this action to the United States Circuit Court for the District of Kansas, Second Division or for the sole and fraudulent purpose of defeating the jurisdiction of the said United States Circuit Court.

WRIGHT & MACY,
HYDE & STALCUP,
HOUSTON & BROOKS,
Attorneys for Plaintiff.

STATE OF KANSAS,
Seward County, ss:

Albert M. Dowell, the above named plaintiff, of lawful age, being first duly sworn on oath, states that he is the plaintiff in the above entitled action; and as such makes this affidavit; and that the matters and facts set — in the foregoing are true.

ALBERT M. DOWELL.

Subscribed and sworn to before me this 22nd day of April, 1908.
[Seal affixed.]
H. W. LANE,
Clerk of the District Court.

Filed April 22nd, 1908.
H. W. LANE, *Clerk.*

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26 And thereafter and on April 24, 1908, at the regular April, 1908, term of said Court, said petition for removal, after argument and due consideration by the Court, was denied and dismissed, to which ruling of the Court the defendant at the time duly excepted, and the said defendant The Chicago, Rock Island & Pacific Railway Company was given thirty days in which to plead to the petition of the plaintiff filed herein, as shown by the journal entry herein, which journal entry is in words and figures here following, to-wit:

27 (Copy.)

In the District Court in and for Seward County, State of Kansas.

ALBERT M. DOWELL, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and ED. JOHNSON, Defendant-.

Journal Entry.

Now on this 22nd day of April, A. D. 1908, the same being the first regular judicial day of the regular April, A. D. 1908, term of said Court, the above entitled cause coming on to be heard, regularly in its order, upon the petition for removal from the above named Court to the United States Circuit Court for the District Court of Kansas, Scond Division, by the defendant, The Chicago, Rock Island and Pacific Railway Company, and the said defendant, The Chicago, Rock Island and Pacific Railway Company appearing by its attorneys M. A. Low, Paul E. Walker, and V. H. Grinstead, and the plaintiff appearing by his attorneys Houston & Brooks; Hyde & Stalcup and Wright & Macy, and the Court having examined the bond for removal approves the same, and the plaintiff having tendered in open court his answer to the said petition for removal and having asked leave of the Court to file same, which was by the Court denied, and to which ruling of the Court the said plaintiff then and there excepted; and the Court having heard the argument of counsel in the matter of the petition for removal and the matters and things therein set forth, and being fully advised in the premises, finds that the said defendant, The Chicago, Rock Island and Pacific Railway Company, is not entitled to a removal of
28–86 said action to the United States Circuit Court for the District of Kansas, Second Division, as prayed for.

It is therefore considered, ordered and adjudged by the Court that the petition for removal of the said defendant, The Chicago, Rock Island and Pacific Railway Company, be and the same is hereby denied and dismissed; the said The Chicago Rock Island and Pacific Railway Company excepted at the time to said Ruling of the Court, and said exception was thereupon allowed by the Court: and it is further considered and ordered by the Court that the said defendant, The Chicago, Rock Island and Pacific Railway Company have, and

the same is hereby given, thirty days from the date hereof in which to plead to the petition of the plaintiff filed herein.

WM. H. THOMPSON, *Judge.*

Houston & Brooks, Hyde & Stalcup, Wright & Macy, Attorneys for Plaintiff.

M. A. Low, Paul E. Walker, V. H. Grinstead, Attorneys for defendant and petitioner, The Chicago, Rock Island and Pacific Railway Company.

Filed April 24, 1908,
H. W. LANE, *Clerk.*

Recorded in Journal # 4, page 268.

* * * * * * *

87–120 ALBERT M. DOWELL, the plaintiff being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows, to-wit:

* * * * * * *

121 Cross-examination for defendant Ed. Johnson.

By V. H. GRINSTEAD:

Q. You are acquainted with Mr. Johnson, the defendant in this case?

A. Acquainted with him? Yes, sir.

Q. How long have you known him?

A. Why, just since I have worked for the Company; two

122 years.

Q. He was the engineer, I believe you stated, in charge of that engine?

A. Yes, sir.

Q. Had you, or not, stated to a number of people that you didn't blame Johnson for the accident?

A. Blame Johnson?

Q. That you didn't blame him any?

A. I never made any such statement.

Q. Never made any such statement to anybody?

A. No, sir. Dr. Smith took my statement. He asked me who to blame. I said I didn't know. He said, "You just as well blame the engineerman. You have to blame somebody."

Q. And then from that you blamed the engineer, Johnson, upon the suggestion of Dr. Smith, did you?

A. Of course, I didn't know what else to say.

Q. You didn't know what else to do but to lay it on to Johnson?

A. I guess it was according to the answer I made to Dr. Smith.

Q. And you brought this suit against Johnson and also against the railway company?

A. Yes, sir.

Q. Didn't you bring this suit against Johnson to avoid having this

case carried to Wichita and tried in the Federal Court? Didn't you make Johnson a defendant in this case for the purpose of preventing the railway company from taking this case out of the District Court here and taking it to Wichita?

A. The lawyers brought the case. I don't know what they brought it that way for.

123 Q. Haven't you told several persons that that was why Mr. Johnson was made a defendant in this case?

A. I don't think I have.

Q. Are you sure you have not?

A. No, sir.

Q. You know a man by the name of Cavinall, who is a fireman on the railroad?

A. I don't know him.

Q. You don't know him?

A. No, sir.

Q. Do you know Bert Rollan?

A. No, sir.

Q. Bert Rollan that used to live here in — town of Liberal?

A. I don't know him; I may have seen him.

Q. Didn't you tell Bert Rollan that you brought this suit against Johnson in order to prevent the Company from taking the case to Wichita for trial, or words to that effect?

A. I don't know the gentleman.

Q. Didn't you tell Bert Cavinall that, substantially?

A. I don't know him.

Q. Wasn't that the reason that you joined Mr. Johnson as one of the defendants in this case?

A. Wasn't that the reason?

Q. Yes.

A. I don't know what the reason was.

Q. You did that in order to have the case tried here, didn't you?

A. The lawyers brought the suit, fixed it up for me.

124 Q. Are you expecting any judgment against Johnson?

A. No, sir.

Objected to by the plaintiff as incompetent, as to what he expects. That is a question of law that plaintiff will not be required to testify about whether or not he expects a judgment against Johnson.

Objection sustained; to which ruling of the Court defendants at the time duly excepted and except.

The plaintiff moves to strike out the answer.

COURT: "The witness will remember not to answer the question when objections are made on either side until after the Court rules. The answer will be stricken out."

Q. Are you expecting to recover of defendant Johnson any money as a result of this law suit?

The plaintiff objects to the question because it is the same question in a different form, and as incompetent, irrelevant and immaterial. It is a question that plaintiff cannot be required to testify about.

Objection sustained, to which ruling of the Court defendants at the time duly excepted and except.

Q. When you brought this suit did you expect to recover any money from the defendant Johnson in this case?

The plaintiff objects as incompetent, irrelevant and immaterial, and it is a question of law as to whether he had a right or not to recover.

The plaintiff withdraws the objection.

125 Q. Now you can answer the question, Mr. Dowell?
(Question read.)

A. I did not.

Q. Mr. Dowell, is it, or not, true that you at the time you brought this suit, and at the present time, you are depending entirely upon the liability of the railway company in this case?

A. At the time I brought the suit.

Q. (Question read). And at the present time?

A. I was living off of the money, yes, sir.

Q. I desire to repeat the question because the witness doesn't understand it. State whether or not it is true you are depending entirely upon a judgment against the railway company in this case and not on a judgment against Mr. Johnson?

A. Yes, sir.

Q. And that was your intent at the time you commenced this suit?

A. My expectation at the time I brought this suit?

Q. And intention at the time you brought this suit?

A. Yes, sir.

Q. You have known Johnson for quite a while?

A. I knowed him ever since I went to work on the yards there.

Q. He has been switching there in the yards all the time you had been working for the company there in the yards, sometimes running an engine on the roads?

A. Yes, sir.

Q. Did you know at the time of the accident that Johnson was running that engine?

A. Did I know it? Well he is the same,—I didn't know him then at that time.

Q. You knew him by sight at the time?

A. Yes, sir.

126 Q. At that time you didn't know his name was Johnson?

A. No, sir; I didn't.

Q. Did you see the engineer as the engine passed you?

A. No, sir; I didn't.

Q. Did you see the fireman?

A. I saw the fireman.

Q. Who was the fireman?

A. Stubb Bell.

Q. You knew him at the time?

A. I didn't know his name.

Q. You since learned his name, but you knew him as a fireman before?

A. Yes, sir.

* * * * * * *

Q. Why do you say you didn't expect to get a judg-
126½–335 ment against Mr. Johnson, Mr. Dowell?

A. I don't expect to get any judgment against him?

Q. Yes, sir; why do you say that? Do you know what judgment means?

A. Of course, I know getting a judgment against any defendant that way.

Q. Why do you say you don't expect to get any judgment against Johnson?

A. Well, I don't know how to answer that.

Q. Do you know of any reason why you should not?

A. No, sir.

* * * * * * *

336–340 In the District Court within and for Seward County Kansas.

ALBERT M. DOWELL, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND ED JOHNSON, Defendants.

Instructions.

By the COURT:

Gentlemen of the Jury:

* * * * * * *

341–351 11. You are instructed that if you should find from the evidence in the case that the plaintiff Dowell did not join the defendant Ed Johnson in his petition as a defendant, with any expectation, hope or intention of finally asking for or recovering any judgment against him, but that he was joined in the suit solely, and entirely, for the purpose of preventing the defendant Railway Company from removing the trial of the case to the Federal Court and for the purpose of defeating the jurisdiction of the Federal Court, then you are instructed that your verdict should be for the defendant Ed Johnson.

* * * * * * *

352–377 THE STATE OF KANSAS,
Seward County, ss:

In the District Court, 32nd Judicial District.

ALBERT M. DOWELL, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and ED JOHNSON, Defendants.

Verdict.

We, the Jury impanelled and sworn in the above entitled case, do, upon our oaths, find for plaintiff and against the defendants, The Chicago, Rock Island and Pacific Railway Company and Ed Johnson, in the sum of $15,000.00.

LARK MITCHELL,
Foreman.

Filed this 16 day of January, A. D. 189—.
E. S. IRWIN,
Clerk Dist. Court.

* * * * * * *

378 Be it further remembered, that afterwards, to-wit, on Saturday the 10th day of December, 1910, the same being one of the regular judicial days of the July 1910 Term of the Supreme Court of the State of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record at page 479 of Journal "OO" of said court, in words and figures as follows, to-wit:

379 Journal "OO", Supreme Court, State of Kansas, December, Session, July Term, 1910, Page 479.

No. 16745.

ALBERT M. DOWELL, Appellee,
v.
THE C., R. I. & P. RY. CO. and ED. JOHNSON, Appellants.

Journal Entry of Judgment.

This cause comes on for decision; and thereupon it — ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellants pay the costs of this case in this court taxed at $— and hereof let execution issue.

380 And on the same day, to-wit the 10th day of December A. D. 1910, there was filed in the office of the clerk of the supreme court of the state of Kansas, the Court's Syllabus and opinion, which syllabus and opinion are in the words and figures as follows, to-wit:

381 No. 16745.

ALBERT M. DOWELL, Appellee,
v.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and ED. JOHNSON, Appellants.

Appeal from Seward County.

Affirmed.

Syllabus by the Court.

JOHNSTON, *C. J.:*

1. An averment that an engineer of a railway company negligently and recklessly ran the engine of which he was in charge against an employee at work upon the track without signal or warning of any kind and thus seriously injured him alleges a misfeasance, a violation of the duty of the engineer to the track worker, and for the wrongful act he and the railway company may be sued jointly by the injured employee.

2. Where the injured employee may proceed jointly or severally against the non-resident railway company and the resident engineer liable for the injury and where he elects in good faith to proceed against them jointly the action does not become a separable controversy for the purpose of removal because the liability of one of the defendants arises under the statute and the other under the common law nor because different lines of proof may be necessary to establish the negligence of each, nor yet because the plaintiff may have misconceived his right of action or may be unable ultimately to sustain it.

3. Since the plaintiff had the legal right to sue the tort-
382 feasors jointly for the wrong done the allegation that the resident and non-resident tort-feasors were sued together for the purpose of preventing a removal of the case to the federal court does not of itself state a fraudulent joinder.

4. A general averment of fraud without stating the facts upon which the charge is based is insufficient to raise an issue for the determination of the court.

5. A showing that the resident defendant is a man of little means and has no property that could be seized to satisfy a judgment rendered against him does not establish that he is a sham party nor that the joinder was fraudulent.

6. An employee at work on a railroad track being in a place of great danger must take reasonable precautions for his safety in such a situation but the degree of care exacted of travellers or persons about to cross a track is not required of one whose duty requires his presence on the track.

7. The notice required to be given to a railroad company in order to fix its liability for an injury to an employee resulting from the negligence of co-employees, or agents of the railroad company, as

provided for in Chapter 341 of the Laws of 1905, may be served by leaving it, or a copy thereof, with the person in charge of any depot or station of the company. This will be effectual without regard to whether or not the railroad company has previously designated a person in the county upon whom service may be made.

383 8. The evidence examined and found to be sufficient to sustain the findings and verdict of the jury.

All the Justices concurring.

A true copy.
Attest:

____ ____,
Clerk Supreme Court.

384 The opinion of the court was delivered by—

JOHNSTON, *C. J.*:

Albert M. Dowell brought this action against the Chicago, Rock Island and Pacific Railway Company and Ed Johnson to recover damages for personal injuries alleged to have been sustained by him through the negligence of the railway company and of Johnson an engineer of the company. Dowell was a yard man at the station of Liberal and on January 21, 1907, was engaged in removing cinders and other debris from a track of the company and while doing so Johnson, it is alleged, negligently backed an engine against him injuring him so that it became necessary to amputate his right leg above the knee and his left leg below the knee. It was alleged that the engine was backed upon him without warning or signal of any kind. There was an averment that Johnson was incompetent and unfit to act as engineer and was known to be so by the railway company and it was also stated that the engine was old and defective and lacked the appliances necessary to control the starting and stopping of the engine and that this too was well known to the railway company. It is further alleged that the injury resulted from the incompetency of Johnson and that from his act in carelessly, needlessly and recklessly running upon and injuring Dowell and that Johnson's act and that of the railway company concurred in inflicting the injury for which the action was brought. Shortly after the filing of the petition and before answer was due the railway company filed its petition for removal to the federal court which after stating the nature of the controversy and that the amount claimed was $40,000 recited that Dowell was a citizen of Kansas and that the railway company was a corporation duly organized under the laws of Illinois and Iowa and is a citizen of those states and not of Kansas. It was further alleged that the cause of action set up by Dowell against the railway company was a separable controversy capable of being finally determined between those

385 parties without the presence of Johnson and it was also charged that "Johnson was joined as defendant in this action by the plaintiff for the sole and fraudulent purpose of defeating

and preventing this defendant, your petitioner, from removing this action from the state court in which it is now pending to the United States Circuit Court * * * and for the sole and fraudulent purpose of defeating said jurisdiction of the said United States Circuit Court in this action." Further along in the petition it is alleged that plaintiff did not have a cause of action against Johnson or any reasonable grounds upon which to base a recovery from him and that there was no joint cause of action against both defendants. It was also alleged that Johnson was a man of small means with little if any property from which a judgment against him could be satisfied while the railway company is solvent with a large amount of property within the jurisdiction of the court to meet any recovery that might be obtained against it. An adequate removal bond was offered which the court approved but the petition for removal was denied. Afterward the railway company answered in the case denying generally and alleging that the injury resulted from the want of ordinary care by Dowell. It was averred that in consideration of the payment of $922.45 that he released the railway company from all liability because of the injury and like averments were made by Johnson in his separate answer. In the reply the circumstances accompanying the signing of the release and a certain receipt were set forth, and it is alleged that the releases were without validity because they were signed when Dowell was mentally and physically incapable of making a contract. The jury made special findings and returned a general verdict against both defendants awarding Dowell damages in the sum of $15,000. The defendants appeal and the first error assigned is upon the denial of the petition for removal.

The contention is that no cause of action was stated against Johnson and no joint cause of action alleged against both appel-
386 lants but that as the petition did state a distinct and separable controversy between Dowell and the railway company, citizens of different states, the petition for removal should have been granted. It is argued that Johnson, being the agent and servant of the railway company, is not liable for mere acts of non-feasance and this appears to be based on the theory that agents are responsible only to their principals and while they may be held for misfeasance they are not liable to third parties for mere omission of duty. This contention overlooks the theory that a servant owes duties to third persons as well as to his master. A servant or employee of a corporation cannot well escape liability for the non-performance of a duty which he owes to an injured third party. The distinctions between liabilities of agents and servants for acts of non-feasance and mis-feasance as well as their liability for the omission of their duties to persons other than their principals and masters are fully discussed and the authorities cited in case notes appended to

Mayer v. Thompson-Hutchinson Building Co., 28 L. R. A. 433.

Ward v. Pullman Co., 25 L. R. A., N. S. 343.

Hagerty v. Wilson, 25 L. R. A., N. S. 356.

If it were granted that Johnson was not liable for mere nonfeasance he would nevertheless be liable for the negligence charged against him in appellee's petition. The allegation is that he carelessly and recklessly ran down and injured appellee with an engine of which he was in charge. This amounts to a charge of violating his duty to appellee and of doing something to his injury. Johnson's act was something more than a breach of contract with his master or an omission of duty to the railway company. It was a positive wrong to appellee, a misfeasance, and he cannot be relieved from liability for it because of his contract relation with his master. Mechem on Agency, sec. 572; 1 A. & E. Encycl. of L. (2d ed.) 1132; 31 Cyc. 1359. Appellee's petition sets up the negli-
387 gence of the company and direct negligent acts of Johnson which concurred with that of the railway company in producing an injury for which a joint action may be brought. The removability of the case is to be determined from the pleadings and the record as they existed when the application to remove was made independent of what is alleged in the petition for removal unless it is made to appear that the defendant were fraudulently joined in order to prevent a removal to the federal court. Louisville & Nashville R. Co. v. Wangelin, 132 U. S. 599. There is some conflict in the authorities relating to the right of removal but under the later decisions of the controlling authority on these questions it must be held that the denial of the petition for removal was not error. A person against whom a joint tort has been committed, as is alleged here, has the right to sue those who inflicted the injury jointly and "a defendant has no right to say that an action shall be several which the plaintiff elects to make joint." Louisville, etc., Railroad Co. v. Ide, 114 U. S. 52. In Powers v. Chesapeake & Ohio Railway, 169 U. S. 92, it was said "A separable defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings." In Alabama Southern Ry. Co. v. Thompson, 200 U. S. 206, it was decided that "It has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack and the case which he makes in his declaration, bill, or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal." A case brought against a master and servant for the joint negligence of both does not become a separable controversy because the plaintiff has misconceived his cause of action or because he may be unable to establish it and his motive in join-
ing them is not material if he is acting within his right.
388 Powers v. Chesapeake & Ohio Railway, supra.
Alabama Southern Ry. Co. v. Thompson, supra.
Cincinnati & Texas Pacific Ry. v. Bohon, 200 U. S. 221.
Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131.
Jacobson v. Chicago, R. I. & P. Ry. Co., 176 Fed. 1004.
Welch v. Cincinnati, N. O. & T. P. Ry. Co., 177 Fed. 760.

The fact that the liability of one of the joint tort feasors was statutory and that of the other arose under the common law does not preclude the joinder of both as defendants or make the controversy separable nor that different lines of proof may be necessary to establish the negligence of each. It is enough if the concurrent acts of negligence of each contributed to the injury inflicted upon the appellant.

Southern Ry. Co. v. Miller, 217 U. S. 209.
Charman v. Lake Erie & W. R. Co., 105 Fed. 449.
Painter v. Chicago, B. & Q. R. Co., 117 Fed. 517.

In its petition for removal the railway company attacks the good faith of the joinder. Under some of the cases its averments although general would raise the issue of fraudulent joinder and if it were properly raised the trial of the issue would be in the federal court. Bank v. Fritzlen, 75 Kan. 479. In the recent case of the Illinois Central R. R. Co. v. Sheegog, 215 U. S. 308, where several tort-feasors were joined as defendants a non-resident defendant asking for removal alleged that the joinder of the defendants was made only for the purpose of preventing removal and was fraudulent and knowingly false. The Supreme Court of the United States in an opinion against which there was a vigorous dissent held the general averments to be insufficient to warrant removal. After stating that a removal could not be prevented where a showing of a fraudulent joinder was made the court proceeded "On the other hand, the mere epithet fraudulent in a petition does not end
389 the matter. In the case of a tort which gives rise to a joint and several liability the plaintiff has an absolute right to elect, and to sue the tort-feasors jointly if he see fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face. Alabama Southern Ry. v. Thompson, 200 U. S. 206; Cincinnati & Texas Pacific Ry. v. Bohon, 200 U. S. 221. If the legal effect of the declaration in this case is that the Illinois Central Railroad Company was guilty of certain acts and omissions by reason of which a joint liability was imposed upon it and its lessor, the joinder could not be fraudulent in a legal sense on any ground except that the charge against the alleged immediate wrongdoer, the Illinois Central Railroad itself, was fraudulent and false." In Hukill v. Maysville & B. S. R. Co., 72 Fed. 745, it was held that if a person had a good cause of action for a joint tort against several defendants it could not be a fraud to join them although the plaintiff would not have brought in the resident defendant except to avoid the jurisdiction of the federal court and it was added "Where he has reasonable ground for a bona fide belief in the facts upon which the liability of all the defendants depends, his motive in joining them cannot be questioned. It is only where he has not, in fact, any cause of action against the defendants, and has no reasonable ground for supposing that he has, and yet joins them, in order to avoid the jurisdiction of the federal court, that the joinder can

be said to be fraudulent, entitling the real defendant to a removal." Under these rulings the facts stated in the petition did not warrant a removal for fraudulent joinder. A general allegation of fraudulent purpose without averments of supporting facts is insufficient. The joinder here could not well be fraudulent unless the charge that Johnson himself was negligent was fraudulent and false. If it were made to appear that Johnson was not in charge of the engine
390 when it was run against appellee or that he had no connection whatever with the tort and that the appellee had joined him as defendant knowing that he had no ground for an action against him but had included him for the purpose of defeating jurisdiction there would be ground for appellant's contention. Here, however, the appellee stated a cause of action and had reasonable grounds for believing that he had a cause of action against both defendants and whether both were negligent was one of the issues to be tried on the merits of the case. No attempt was made to show that appellee's statements of facts as to the participation of defendants in the wrongful injury were false and without foundation and it has been often decided that a general averment of fraud without stating the facts upon which the charge is based presents no issue for determination.

The State ex rel. v. Williams, 39 Kan. 517.
K. P. & W. Rld. Co. v. Quinn, 45 Kan. 517.
Ladd v. Nystol, 63 Kan. 23.
Warax v. Cincinnati, N. & O. T. P. Ry. Co., 72 Fed. 637.
Offner v. Chicago & E. R. Co., 148 Fed. 201.
Jacobson v. Chicago, R. I. & P. Ry. Co., Supra.

It is alleged it is true that Johnson is a man of small means who has little property subject to application upon a judgment obtained against him but it has been decided that "A defendant who is legally liable together with another and whose presence defeats the right of removal is neither a nominal nor a sham party merely because he is pecuniarly irresponsible, so that a judgment against him would be of no value." Deere, Wells & Co. v. Chicago, M. & St. P. Ry. Co. 85 Fed. 876. Welch v. Cincinnati, N. O. & T. P. Ry. Co., supra.

The questions presented on the merits relate mostly to the sufficiency of the evidence to sustain the findings and judgment. It is contended that the demurrers to the evidence of appellee should have been sustained and a verdict for appellants directed.
391 It is argued that the release signed by appellee operated to discharge the railway company from any liability because of the injury to him. While he was in the hospital and on March 7, 1907, appellee signed a paper at the instance of an agent of the railway company which purported to release the company from any liability for any loss or damage because of his injury for a consideration of $800.00. After leaving the hospital and on April 26, 1907, he executed a receipt for $122.45 which recited that it was a completion of the former agreemeent of settlement and it also purported to be a full release and discharge of the railway company for appellee's injury. This amount is said to have been given to

pay for a wheeled-chair and for transportation to bring appellee's parents to him. Evidence was offered to prove that appellee was mentally incapable of making contracts or of executing releases when the papers were signed. The jury made special findings that appellee was "Mentally incompetent to understand the nature and character of his act when he signed the alleged release in question in this action" and also that he was "weak minded and incapable mentally of understanding or transacting ordinary business transactions at the time he signed the alleged release in question." The sufficiency of the testimony to sustain these findings is challenged. Some of that offered was of little weight or force because of the lack of opportunity that witnesses had for learning and judging of appellee's mental condition and also because of the lapse of time between the execution of the release and the examination of appellee by those witnesses. However, considerable testimony was offered which did tend to show incapacity and which is deemed to be sufficient to uphold the findings. There were findings to the effect that appellee's signatures to the release and receipt were obtained by fraudulent representations and it is claimed that these findings too are unwarranted but if appellee did not under-
392 stand the nature of his acts and was mentally incapable of executing releases this feature of the case is not important. It is further argued that if appellee was an imbecile and incapable of making a settlement or contract he necessarily lacked capacity to bring and maintain the action. The findings of the jury relate to the time the release was executed and his capacity to maintain an action when it was begun or afterwards was not involved. While there was testimony tending to show that he was weak minded when the trial was had the condition at that time was not an issue and the findings of the jury did not relate to that time.

Although contended for, it cannot be held as a matter of law that appellee's contributory negligence precludes a recovery. He was injured while working on a track in the day time. When the engineer ran the engine down the track appellee stepped aside to let it pass. After going a short distance the engine stopped near a water tank and appellee understood those on the engine to say that they were going to take water. He stepped back on the track and resumed his work a few feet at the rear of the engine. The engine only stopped a minute or so when it was suddenly started backwards, one witness saying that the engineer appeared to throw it wide open, and he did run it against appellee without ringing the bell or the giving of any signal. Appellee, of course, knew the engine was likely to be moved again soon but if his testimony was true he had some reason to think that it would not be moved until water was taken, and he had some reason to expect that it would not be moved without ringing the bell as that was the rule and practice of the yard. Those on the engine either saw or should have seen appellee working on the track as they approached him on the way to the stopping place and knowing he was at work there ordinary prudence would seem to require a ringing of the bell or the giving of some signal before starting
393 the engine backward. While an employee working on the track is in a place of great danger and is required to take rea-

sonable precautions for his safety the degree of care exacted of travellers or persons about to cross a track is not required of one whose duty requires his presence on the track. Comstock v. U. P. Ry., 56 Kan. 228; Railroad Co. v. Bentley, 78 Kan. 221. If he fails to take the precautions which the perils of the situation and reasonable prudence require his negligence would defeat a recovery. As appellee had reason to think that some time would be consumed in taking water and that those in control of the engine knew of his presence on the track and would give a warning before moving the engine backwards, the question whether he was guilty of contributory negligence was for the jury and could not be determined by the court as a matter of law.

There is a contention that the railway company was not given the notice required by statute. Laws of 1905 Chap. 341. A notice was served on the agent of the railway company in charge of the station at Liberal in due time. The claim is that the appellee was required to serve notice on the persons designated by the company in pursuance of the provisions of section 4499 of the General Statutes of 1901 and that notice could not be made upon other representatives of the company unless the company had failed to designate or appoint a person in the county upon whom process should be served. Nothing in the record is found to show whether the railway company has made a designation or not. Section 2 of the act referred to does provide that notice may be served on the person designated by the company and that if no one is designated then it may be served on a local superintendent, a freight agent, an agent to sell tickets or a station keeper. This alone might indicate that service on the superintendent or other agents would be unavailing unless it was made to appear that no one had been designated by the railway company in the county to accept such service and that one relying on
394 such a notice must show that the designation had not been made. In the latter part of the section, however, is a further provision that an effectual service may be made "by leaving a copy thereof at any depot or station of such company or corporation in such county with the person in charge thereof or in the employ of such company or corporation." It appears that compliance was made with this alternative provision as it was shown that a written notice was given to or left with the agent in charge of the station or depot at Liberal, and this was sufficient.

There were objections to testimony some of which may have been inadmissible but in view of the special findings which fixed the cause and the time of the injury the objections are deemed to be immaterial and do not furnish any grounds of reversal.

Finding no prejudicial error the judgment of the district court will be affirmed.

All the Justices concurring.

A true copy.
Attest:

_____,
Clerk Supreme Court.

395 In the Supreme Court of Kansas.

No. 16,745.

ALBERT M. DOWELL, Appellee,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and EDWARD JOHNSON, Appellants.

STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all the pleadings and papers filed, and of all the proceedings had in the above entitled cause, including the opinion of the court rendered therein, as the same are entered and now appear of record in my office.

Witness my hand and seal of the Supreme Court of the State of Kansas hereto affixed at my office in the City of Topeka, this 3d day of January, 1911.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of the State of Kansas.

396 Here follow, the petition for a writ of error, and allowance of same, the assignments of error, a copy of the bond for supersedeas and appeal, the writ of error, the citation and acknowledgement of service.

397 In the Supreme Court of Kansas.

No. 16,745.

ALBERT M. DOWELL, Appellee,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and EDWARD JOHNSON, Appellants.

UNITED STATES OF AMERICA,
State of Kansas:

To the Honorable William A. Johnston, Chief Justice of the Supreme Court of Kansas:

The petition of The Chicago, Rock Island and Pacific Railway Company and Edward Johnson respectfully shows, that on the 10th day of December, 1910, the Supreme Court of the State of Kansas made and entered a final order and judgment herein in favor of the appellee, Albert M. Dowell, and against your petitioners, in a certain

case wherein Albert M. Dowell was plaintiff, and your petitioners, The Chicago, Rock Island and Pacific Railway Company and Edward Johnson were defendants, for fifteen thousand dollars ($15,000) and for costs, as will appear by reference to the record and proceedings in said cause, in which final order and judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, all of which will more in detail appear from the assignment of errors which
398 is filed with this petition. That the said Supreme Court of Kansas is the highest court of the said State of Kansas in which a decision in this suit and in this matter could be had.

Wherefore, your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of Kansas and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioners be examined and corrected, and said judgment and your petitioners discharged; and for citation and supersedeas; and your petitioners will ever pray.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND EDWARD JOHNSON, *Petitioners,*
By M. A. LOW.
PAUL E. WALKER,
Attorneys for Petitioners.

398½ [Endorsed:] No. 16,745. In the Supreme Court of Kansas. Albert M. Dowell, Appellee, vs. The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, Appellants. Petition for Writ of Error. Filed Dec. 19, 1910. D. A. Valentine, Clerk Supreme Court.

399 In the Supreme Court of Kansas.

No. 16,745.

ALBERT M. DOWELL, Appellee,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and EDWARD JOHNSON, Appellants.

The above entitled matter coming on to be heard upon the petition of the appellants The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Kansas, and upon examination of said petition and the record in said matter, and desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter, it is ordered that the writ of error prayed for be, and it is hereby allowed to this court from the

Supreme Court of the United States, and that the bond presented by said petitioners The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, be, and the same is hereby approved; which bond shall operate as a supersedeas bond.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Dec. 19", 1910.

399½ [Endorsed:] No. 16,745. In the Supreme Court of Kansas. Albert M. Dowell, Appellee, vs. The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, Appellants. Order Allowing Writ of Error and Approving Bond. Filed Dec. 19, 1910. D. A. Valentine, Clerk Supreme Court.

400 In the Supreme Court of Kansas.

No. 16,745.

ALBERT M. DOWELL, Appellee,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and EDWARD JOHNSON, Appellants.

Assignment of Errors.

The appellants in the above entitled cause, The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, in connection with their petition for a writ of error herein, present and file therewith their assignment of errors, as to which matters and things they say that the decision and final judgment of the Supreme Court of the State of Kansas, entered herein on the 10th day of December, 1910, is erroneous, to-wit:

First. The court erred in holding that The Chicago, Rock Island and Pacific Railway Company was not entitled under the act of Congress approved March 3rd, 1887 (24 Stat. 552), as corrected by the act of August 13th, 1888 (25 Stat. 433), to have said cause removed to the Circuit Court of the United States for the District of Kansas, Second Division.

Second. The court erred in holding that the provisions of the acts hereinbefore mentioned did not entitle The Chicago, Rock Island and Pacific Railway Company, the above named appellant, to have said cause transferred to and heard and determined in the Circuit Court of the United States for the District of Kansas, Second Division.

401 Third. The court erred in holding that the District Court of Seward County, Kansas, had jurisdiction to try and determine said cause notwithstanding the fact that the above-named appellee Albert M. Dowell, was a citizen at the time of the commencement of said cause, and at all times since has been a citizen of the

state of Kansas, during all of which times the appellant, The Chicago, Rock Island and Pacific Railway Company was, and at all times since has been a corporation organized and existing under and by virtue of the laws of the states of Illinois and Iowa, and a citizen of said states, and notwithstanding the fact that the suit was of a civil nature, and that the amount in controversy exceeded exclusive of interest and costs the jurisdictional amount provided for in said acts of Congress.

Fourth. The court erred in holding that the provisions of the said acts of Congress hereinbefore mentioned did not entitle the above named appellant, The Chicago, Rock Island and Pacific Railway Company to have said cause transferred for trial to the Circuit Court of the United States for the District of Kansas, Second Division, under the terms and provisions of the act of Congress approved March 3rd, 1887, as corrected by the act of August 13th, 1888, which provided for the removal of causes from state courts to United States courts for trial and disposition.

Fifth. The court erred in ordering judgment to be entered against the appellants, The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, or either of them.

Wherefore, the appellants The Chicago, Rock Island and Pacific Railway Company and Edward Johnson pray that said decision and final judgment may be reversed and that said appellants may have an adjudication and decree in their favor as herein specified, and for costs.

M. A. LOW,
PAUL E. WALKER,
Attorneys for Appellants, The Chicago, Rock Island and Pacific Railway Company and Edward Johnson.

401½ [Endorsed:] No. 16,745. In the Supreme Court of Kansas. Albert M. Dowell, Appellee, vs. The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, Appellants. Assignment of Errors. Filed Dec. 19, 1910. A. E. Valentine, Clerk Supreme Court.

402 In the Supreme Court of Kansas.

No. 16,745.

ALBERT M. DOWELL, Appellee,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and EDWARD JOHNSON, Appellants.

Bond.

Know all men by these presents, That we The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, as principals, and J. R. Mulvane, as surety, are held and firmly bound unto Albert M. Dowell, in the sum of — to be paid to the said obligee,

his successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our successors, heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of December, 1910.

Whereas, the above named appellants, The Chicago, Rock Island and Pacific Railway Company and Edward Johnson have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Kansas.

Now, therefore, the condition of this obligation is such that if the above named appellants The Chicago, Rock Island and Pacific Railway Company and Edward Johnson shall prosecute their said writ of error to effect and answer all costs and damages rendered,
403 and to be rendered in case the decree shall be affirmed in said Supreme Court, then this obligation shall be void; otherwise it shall remain in full force and effect.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
By M. A. LOW,
Its Agent and General Attorney;
J. R. MULVANE,
ED. JOHNSON.

STATE OF KANSAS,
County of Shawnee, ss:

On this 16 day of December, 1910, personally appeared before me M. A. Low, who being duly sworn deposes and says, that he is the Agent and General Attorney of The Chicago, Rock Island and Pacific Railway Company, and as such Agent and General Attorney is authorized to sign the foregoing instrument, and that the said M. A. Low acknowledged the said instrument to be the free act and deed of said corporation.

[SEAL.] LUTHER BURNS,
Notary Public.

My commission expires April 24, 1911.

404 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said Supreme Court of the State of Kansas, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Albert M. Dowell and The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, wherein was drawn in question the construction of a clause of the Constitution of the United States, or a statute of the United States, being a right, privilege and immunity claimed under the Constitution and Statutes of the United States, and the decision was against the right,

privilege and immunity specially set up and claimed by the defendants under such clause of the said Constitution and Statutes of the United States, and manifest errors hath happened to the great damage of the said The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington and filed in the office of the Supreme Court of the United States
405 within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States this 19th day of December, in the year of our Lord, One Thousand Nine Hundred and Ten.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. H. LARITT,
Clerk Circuit Court of the United States
for the District of Kansas.

Allowed by:

W. A. JOHNSTON,
Chief Justice of the Supreme Court
of the State of Kansas.

405½ [Endorsed:] No. 16746. In the Supreme Court of Kansas. Albert M. Dowell, Appellee, vs. the Chicago, Rock Island and Pacific Railway Company and Edward Johnson, Appellants. Writ of Error. Filed Dec. 19, 1910. D. A. Valentine, clerk Supreme Court.

406 THE UNITED STATES OF AMERICA, *ss:*

To Albert M. Dowell:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, thirty days from and after the date hereof pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Kansas, wherein The Chicago, Rock Island and Pacific Railway Company and Edward Johnson are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, as in

the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, this 19th day of December, 1910.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

A copy of the within citation is received this 20" day of December, 1910, and due and legal service of this citation on behalf of the defendant in error Albert M. Dowell, is hereby acknowledged, and appearance in the Supreme Court of the United States is hereby entered.

J. D. HOUSTON,
HOUSTON & BROOKS,
F. S. MACY,
Attorneys of Record for Defendant in Error, Albert M. Dowell.

406½ [Endorsed:] No. 16745. In the Supreme Court of Kansas. Albert M. Dowell, appellee, vs. The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, appellants. Citation. Filed Dec. 22, 1910. D. A. Valentine, clerk Supreme Court.

407 In the Supreme Court of Kansas.

No. 16745.

ALBERT M. DOWELL, Appellee,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and EDWARD JOHNSON, Appellants.

STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that there was lodged with me as such clerk on the nineteenth day of December, 1910, in the above entitled cause:

1. The original bond, of which a copy is herein set forth.
2. Two copies of the writ of error with accompanying papers, as herein set forth—one for the defendant in error Albert M. Dowell, and one to be filed in my office.

In Witness Whereof, I have hereunto set my hand and caused the official seal of the Supreme Court of the State of Kansas to be hereto affixed at my office in the City of Topeka, this 3d day of January, 1911.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of the State of Kansas.

408 In the Supreme Court of Kansas.

No. 16745.

ALBERT M. DOWELL, Appellee,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and EDWARD JOHNSON, Appellants.

STATE OF KANSAS,
Supreme Court, ss:

In obedience to the command of the writ of error issued from the Supreme Court of the United States of America in the above entitled cause, I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do herewith transmit to the said Supreme Court of the United States of America, a duly certified transcript of the record and proceedings of the Supreme Court of the State of Kansas, in said above entitled cause, with all things concerning the same.

In Witness Whereof, I have hereunto set my hand and caused the official seal of the Supreme Court of the State of Kansas to be hereto affixed at my office in the City of Topeka, this 3d day of January, 1911.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

—, paid by The Chicago, Rock Island and Pacific Railway Company.

———— ————,
Clerk Supreme Court of the State of Kansas.

409 In the Supreme Court of the United States.

No. —.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and EDWARD JOHNSON, Plaintiff in Error,
vs.
ALBERT M. DOWELL, Defendant in Error.

Stipulation as to Printing Record.

It is hereby stipulated and agreed by and between M. A. Low, Counsel for Plaintiffs in Error, and J. D. Houston and F. S. Macy, Counsel for Defendant in Error, that in order to save expense in the printing of the record herein and for greater convenience, the following portions of the record, the same being sufficient to show the errors complained of, shall be printed, and no more, to-wit:

Recital of Appeal, excepting last paragraph. Page 1.

Specification of Errors in the Supreme Court of the State of Kansas. Page 3.

Petition. Pages 8-12.

Petition for Removal. Pages 17-21.

Bond for Removal. Pages 22-23.

Answer to Petition for Removal. Page 25.

Recital and Journal Entry denying the Petition for Removal. Pages 26-28.

Cross-examination of the Defendant in Error, Albert M. Dowell, by V. H. Grinstead, Attorney for Edward Johnson, one of the Plaintiffs in Error. Pages 121-126.

410 Redirect examination of the Defendant in Error, Albert M. Dowell, beginning with the third question on the page: "Why do you say you didn't expect to get a judgment against Mr. Johnson, Mr. Dowell?" and ending with the last answer on the page: "No, sir." Page 126½.

Instruction number eleven given by the trial court to the jury. Page 341.

Verdict. Page 352.

Page 378.

Journal Entry of Judgment. Page 379.

Opinion of the Supreme Court of the State of Kansas. Pages 380-394.

Certificate of the Clerk of the Supreme Court of the State of Kansas to the Transcript of Record. Page 395.

Petition for a Writ of Error. Pages 397-398.

Order allowing Writ of Error, and approving Bond. Page 399.

Assignment of Errors. Pages 400-401.

Bond. Pages 402-403.

Writ of Error. Pages 404-405.

Citation to Albert M. Dowell with acknowledgment of service and entry of appearance thereon. Page 406.

Certificate of Lodgment. Page 407.

Certificate of Transmissal. Page 408.

Stipulation as to printing record.

It is further stipulated and agreed that if from mistake or omission any part of the record necessary to present the questions raised by the assignment of errors, be not thus printed, that the Plaintiffs in Error or either of them shall have the right to include and print, or may be required to print by the Defendant in Error any further or additional portions thereof.

M. A. LOW,
Counsel for Plaintiffs in Error.
J. D. HOUSTON,
F. S. MACY,
Counsel for Defendant in Error.

DAVID SMYTH.
Att'y for Def't in Error.

411 [Endorsed:] 866/22487. No. —. In the Supreme Court of the United States. The Chicago, Rock Island and Pacific Railway Company and Edward Johnson, Plaintiffs in Error, vs. Albert M. Dowell, Defendant in Error. Stipulation as to printing record.

412 [Endorsed:] File No. 22,487. Supreme Court U. S. October Term, 1910. Term No. 866. The C., R. I. & P. Ry. Co. et al., Pl'ffs in Error, vs. Albert M. Dowell. Stipulation as to parts of record to be printed. Filed February 16, 1911.

Endorsed on cover: File No. 22,487. Kansas, Supreme Court. Term No. 208. The Chicago, Rock Island & Pacific Railway Company and Edward Johnson, plaintiffs in error, vs. Albert M. Dowell. Filed January 21st, 1911. File No. 22,487.

In the Supreme Court of the United States.

October Term, 1912.
No. 208.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND EDWARD JOHNSON,

Plaintiffs in Error,

vs.

ALBERT M. DOWELL,

Defendant in Error.

In Error to the Supreme Court of the State of Kansas.

Brief for Plaintiffs in Error.

F. C. DILLARD,
PAUL E. WALKER,
For Plaintiffs in Error.

J. D. HOUSTON,
E. C. HYDE,
F. S. MACY,
For Defendant in Error.

Printing Dept., Kansas Farmer, Topeka.

In the Supreme Court
of the United States.

October Term, 1912.

No. 208.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND EDWARD JOHNSON,

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VS.

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In Error to the Supreme Court of the State of Kansas.

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In the Supreme Court
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Defendant in Error.

In Error to the Supreme Court of the State of Kansas.

Brief for Plaintiffs in Error.

STATEMENT.

On February 15, 1908, the defendant in error, Albert M. Dowell, filed a petition in the District Court of Seward County, Kansas, in which he alleged that he was employed as a section laborer, and while removing a shovel full of cinders from one of the tracks of

the plaintiff in error, The Chicago, Rock Island and Pacific Railway Company, in its yard at Liberal, Seward County, Kansas, the plaintiff in error, Edward Johnson, being in charge of a switch engine of the Railway Company, as engineer, negligently backed the engine upon him without warning or signal of any kind. (Transcript, 3.) It was charged that said engineer was incompetent, unskilled and unfit to discharge the duties of an engineer at the time he was employed by the Railway Company, and that since that time he had been unskilled, unfit and incompetent to perform the duties of an engineer, as the Railway Company well knew, but of which the plaintiff was ignorant. (Transcript, 3.) It was also charged that said engine was old, defective and unsafe, in that it leaked steam into its cylinder and would not stand when left alone, but would move without the intervention of human or outside agency; that the appliances for starting and stopping said engine were so defective that the same would start and stop without reference to said machinery, and would not respond to the same; that said engine, being at the time of the accident engaged in moving interstate commerce, was without proper, sufficient or safe driving wheel brakes, all of which was well known to the defendants, but of which the plaintiff was ignorant. (Transcript, 3, 4.)

Following these charges it was claimed that the injury to the plaintiff was the direct and proximate result (1) of the unfitness and incompetency of the defendant Johnson, and of his negligence and carelessness in carelessly, recklessly and needlessly running said engine upon the plaintiff, and of his careless failure in neglecting to use proper precaution to observe and avoid running down the plaintiff, (2) of the carelessness of the Railway Company in employing Johnson as engineer, and in retaining him and allowing him to act as engineer at the time and place in question, and (3) of the carelessness of the defendant Railway Company in knowingly retaining and using said defective engine at said time and place, and (4) in carelessly failing to take proper precaution to prevent injury to the plaintiff at said time and place. (Transcript, 3.)

Thereafter, the plaintiff in error, The Chicago, Rock Island and Pacific Railway Company, within the time required by statute, filed its petition for the removal of the suit to the United States Court for the proper district, on the ground that the amount in controversy was sufficient, and that there was the requisite diversity of citizenship between the plaintiff, a citizen of Kansas, and the Railway Company, a citizen of the states of Illinois and Iowa; that there was a separable controversy between said parties, which could be fully

determined without the presence of the other defendant; and that the resident defendant, Johnson, was fraudulently joined for the purpose of preventing the petitioning defendant from transferring the suit to the United States Court. (Transcript, 5-7.) The petition for removal was verified and was accompanied by a bond sufficient in amount and conditioned according to law. (Transcript, 8.) Thereafter, the State Court denied the petition for the removal of said cause to the United States Court, at the same time approving in form and amount the bond submitted therewith. Subsequently the Supreme Court of the State of Kansas affirmed this ruling. (*Dowell v. Chicago, R. I. & P. Ry. Co. et al.*, 83 Kan. 562, 112 Pac. Rep. 136; Transcript, 16.)

SPECIFICATION OF ERRORS.

The District Court of Seward County, Kansas, and the Supreme Court of Kansas, Erred in Refusing to Order the Removal of the Suit to the United States Court.

BRIEF AND ARGUMENT.

The Controversy Between the Plaintiff and The Chicago, Rock Island and Pacific Railway Company, the Removing Defendant, was Separable.

1. *By the Express Terms of the Kansas Statute the several Causes of Action against the Railway Company for its Own Negligence Could not be Joined with the Cause of Action against the Resident Defendant for his Negligence.*

The cases in which this Court has held that a separable controversy did not exist between the plaintiff and the petitioning defendant were all actions in which the laws of the State where they were commenced made the particular cause of action against the defendants joint or several at the option of the plaintiff.

And it is in this particular that the line of demarcation between the case at bar and those cases is sharply drawn. Whether the allegations of a petition show a joint cause of action against the defendants, and whether there is a separable controversy between the plaintiff and the removing defendant, depends upon the law of the State where the action is commenced. *Enos v. Kentucky Distilleries & Warehouse Co. et al.*, 189 Fed. Rep. 342; *Nicholas v. Chesapeake & O. Ry. Co. et al.*, 195 Fed. Rep. 913; *Veariel v. United Engineering & Foundry Co.*, 197 Fed. Rep. 877; *M'Alister v. Chesapeake & O. Ry. Co. et al.*, 198 Fed. Rep. 660; *Illinois Central R. Co. v. Sheegog*, 215 U. S. 308, 317.

At the time the case at bar was commenced and tried, Section 83 of the Civil Code of Kansas (Gen.

Stat. 1901, Sec. 4517; Gen Stat. 1905, Sec.4965.) permitted the joinder of several causes of action in one suit, but only when *all of such causes of action affect all the parties to the action.* The statute is as follows:

"The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of either one of the following classes:

First. The same transaction, or transactions, connected with the same subject of action.

Second. Contracts, express or implied.

Third. Injuries, with or without force, to person and property, or either.

Fourth. Injuries to character.

Fifth. Claims to recover the possession of personal property, with or without damages for the withholding thereof.

Sixth. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same.

Seventh. Claims against a trustee by virtue of a contract, or by operation of law.

But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, except in actions to enforce mortgages or other liens."

Under this statute, the several causes of action against the defendant Railway Company, for its own negligence, and the cause of action against the resi-

dent defendant, for his personal negligence, could not be joined in the same petition. While these several causes of action may arise out of the same transaction, or from an injury to the person of the plaintiff, yet they do not "affect all the parties to the action." Whatever may be true with respect to whether the cause of action against the resident defendant may affect the Railway Company, the master, it is manifestly true that the several causes of action stated against the defendant Railway Company for its own negligence do not affect the resident defendant. The rule is well settled in Kansas, that unless all the causes of action united in a petition affect all of the defendants, there has been a wrongful joinder of parties defendant. *Palmer v. Waddell,* 22 Kan. 352; *Jeffers v. Forbs,* 28 Kan. 174; *Hurd v. Simpson,* 47 Kan. 372, 374, 27 Pac. Rep. 961; *Haskell County Bank v. Bank of Santa Fe,* 51 Kan. 39, 32 Pac. Rep. 624; *New v. Smith,* 68 Kan. 807, 74 Pac. Rep. 610; *State v. Shufford,* 77 Kan. 263, 94 Pac. Rep. 137.

In the early case of *Lindh v. Crowley,* 26 Kan. 47, 50, it was said:

"It will not do to unite in one pleading a cause of action against two or more with a cause of action against a part of the defendants only."

And in *Hentig v. Benevolent Association,* 45 Kan. 462, it was held that:

"It is one of the prerequisites to the uniting of different causes of action that all the causes of action must affect all the parties to the action."

In *Ritzer v. Board of Commissioners of Davis County, et al.*, 48 Kan. 389, 392, 29 Pac. Rep. 595, it was held that a cause of action against a board of county commissioners of a county, in favor of one who had been treasurer thereof, for a settlement of his accounts as treasurer, cannot be joined with a cause of action in his favor against the sureties on his official bond, for wrongfully converting property deeded by him in trust for their protection, as the cause of action against the county for an accounting in no wise affects the sureties on the plaintiff's bond. The court said:

"He could not have a cause of action against the sureties on his official bond for any sum the county might owe him as treasurer thereof. And since this cause of action cannot affect any of the defendants other than the Board of County Commissioners, and is joined with the cause of action against the other defendant, it follows that the two causes of action are improperly joined."

Likewise here, the alleged causes of action against the Railway Company itself for its own negligence cannot affect the resident defendant.

In *Atchison, Topeka & S. F. R. Co. et al., v. Board of Commissioners of Sumner County et al.*, 51 Kan.

617, 33 Pac. Rep. 312, the Supreme Court of Kansas held that a cause of action in favor of a plaintiff and against one defendant cannot be united with another cause of action in favor of the same plaintiff and against another defendant where neither defendant is interested in the cause of action alleged against the other.

In *Harod v. Farrar, et al.*, 68 Kan. 153, 155, 74 Pac. Rep. 624, the court held that several causes of action cannot be united in one petition unless they all arise out of the same transaction and are all connected with the same subject of action, nor unless each cause of action so united affects all of the parties. In the case at bar, the alleged negligence of the Railway Company for its own want of care, as distinguished from that of its employes, grew out of transactions not connected with the alleged negligence of the resident defendant. The subject of the action is the particular act relied upon in that cause of action, and the subject alleged in each of the several causes of action differs from the subject of action in every other cause. The Supreme Court of Kansas then proceeds: "Each defendant must in some way be affected by the judgment rendered on each cause of action," and in the case before that court, the joinder was held improper because "neither (defendant) would have any interest

in, or be in any way affected by, the judgement against the other." Tested by this rule, the joinder in the case at bar was not proper under the Kansas statute, as, manifestly, the resident defendant could, under no circumstances, be affected by a possible judgment against the Railway Company for its separate negligence.

In *Benson v. Battey*, 70 Kan. 288, 78 Pac. Rep. 844, the court held that a cause of action for an equitable accounting against two defendants could not be joined in a petition with a cause of action at law to recover damages in tort against another defendant not affected by the same cause of action, as there was a misjoinder of causes of action. Even though the causes of action united in that petition were not in their nature incongruous, the fact that each did not affect all of the defendants clearly showed a misjoinder. And in 3 Am. & Eng. Anno. Cases, 283, 285, this case is made the foundation for a general note on the subject of misjoinder, in which it is said, in calling attention to the vast number of cases in accord with the rule expressed in the case of *Benson v. Battey, supra*:

> "The general rule announced in the reported case, that it is a prerequisite to the joinder of causes of action that all the causes should affect all the parties defendant to the action, is well settled."

In *Griffith v. Griffith et al.*, 71 Kan. 547, 549, 81

Pac. Rep. 178, it was held that where a grantor executes two deeds conveying tracts of land to two different persons, the heirs of the grantor cannot institute a proceeding against both grantees to set aside the deeds, as, under the Kansas statute, the causes of action are improperly joined. The court held that the fact that there was a common grantor did not unify the interest conveyed nor make the recovery of the land a single cause of action. The fact that the causes of action or the remedies sought belong to the same general class does not justify a joinder. The court held that since one defendant is not affected by the cause of action against the other, the petition, if it states a cause of action at all, states one against each defendant, and as the several causes of action do not affect both defendants, there was necessarily a misjoinder of causes of action.

In *Mentzer v. Burlingame, et al.*, 71 Kan. 581, 583, 81 Pac. Rep. 196, the Supreme Court of Kansas held that the sureties on two notes, even if they arose out of the same transaction, were improperly joined, as the several defendants were not affected by the cause of action against the other.

In *State v. Addison*, 76 Kan. 699, 704, 92 Pac. Rep. 581, the Supreme Court of Kansas held that where a petition contains separate and distinct causes of action,

each of which depends upon its own peculiar facts, neither defendant being necessarily interested in the defense or success of the co-defendant, there is a necessary misjoinder under the Kansas statute.

Manifestly, in the petiton there were several "causes of action", and it is equally apparent that all of these several causes of action did not "affect all the parties to the action." It does not need argument to demonstrate that the resident defendant cannot be interested in nor affected by the result of the alleged cause of action against the Railway Company for its separate and distinct negligence in hiring and retaining in its employment an incompetent employe, or in furnishing a defective engine in violation of the provisions of the Federal Safety Appliance Act, or in carelessly failing to take proper precaution to prevent such injuries; and while a court is not justified in saying that a cause of action which the plaintiff seeks to make joint can be made separable at the suggestion of one of the defendants, it is equally true that a plaintiff cannot, by an assertion that several defendants are jointly liable, make a cause of action joint when the statutes of the state creating the cause of action deny such right.

The fact that the questions involved in the several causes of action are similar is immaterial; the similar-

ity of the questions involved in two or more causes is not a sufficient foundation for a joint suit against two or more defendants. The common interest necessary to enable a plaintiff to sue two or more persons jointly must be in the subject matter of the action, and not merely the legal questions involved in the separate causes of action. *Hudson et al. v. Commissioners of Atchison County*, 12 Kan. 141, 146; *Swenson et al v. Moline Plow Co.*, 14 Kan. 387; *State ex rel v. Commissioners of Reno County*, 38 Kan. 317.

Likewise, the fact that the several causes of action in a sense relate to the same subject—the accident and the resulting injury to the plaintiff—is not material. *Marshall v. Saline River Land Company*, 75 Kan. 445, 449, 89 Pac. Rep. 905. And it is unimportant that both defendants were bound, for different reasons, to perform the same service of care to the plaintiff. *Stewart v. Rosengren*, 66 Neb. 445, 92 N. W. Rep. 586. At common law, liability of the defendant, if any, and under any possible allegations, was due solely to the separate acts and separate defaults of the defendants, for the acts or defaults of neither of which was the other interested or bound to protect against. There can be no pretense that, at common law, the alleged cause of action against the resident defendant for his personal negligence in any way affected the railway

company, nor that the several causes of action against the Railway Company for its own negligence could in any way whatever affect the resident defendant. It must follow, therefore, that the several causes of action alleged against the Railway Company itself could not, under the Kansas statute, be joined with a cause of action against the resident defendant for his personal negligence. A charge of joint negligence should not be permitted to prevail in the face of the fact that under the statutes of the state where the cause of action arose and the suit was commenced, there could, as a matter of law, be no joint recovery, and it must follow that the unauthorized joinder of actions cannot prevent the removal of the controversy between the plaintiff and the defendant Railway Company.

2. The alleged causes of action by which the plaintiff sought to recover from the Railway Company on account of the negligence of the resident defendant, under the Kansas Fellow Servant Act, and the cause of action against the resident defendant for his own negligence, were separable.

From the allegations of the petition it is manifest that, at common law, the plaintiff and the resident defendant were fellow servants. They were engaged in the same general undertaking, and employed to perfrom duties tending to accomplish the same general

purpose. They were employed in a common enterprise. The services of each, in his particular sphere, were directed toward the accomplishment of the same general end. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368; *Central R. Co. v. Keegan*, 160 U. S. 259; *Northern Pacific R. Co. v. Peterson*, 162 U. S. 346; *Northern Pacific R. Co. v. Poirier*, 167 U. S. 48; *Alaska Mining Co. v. Whelan*, 168 U. S. 86; *New England R. Co. v. Conroy*, 175 U. S. 323; *Northern Pacific R. Co. v. Dixon*, 194 U. S. 338. A section laborer is a fellow servant of an engineer of a locomotive running over the track upon which the section laborer is working. 8 Am. & Eng. Anno. Cas. 233; *Northern Pacific R. Co. v. Hambly*, 154 U. S. 349; *Northern Pacific R. Co. v. Charless*, 162 U. S. 359; *Martin v. Atchison, T. & S. F. R. Co.*, 166 U. S. 399; *Texas & Pacific R. Co. v. Bourman*, 212 U. S. 536; *Butler v. Grand Trunk Junction R. Co.*, 224 U. S. 85.

At common law the defendant Railway Company would not have been liable to the plaintiff for the negligent act of the resident defendant. If at all, so far as the negligence of the resident defendant is concerned, the defendant Railway Company was liable to the plaintiff only under the terms and provisions of the statute of Kansas, entitled "An act fixing the liabilities of

railroad companies in certain cases, etc." This statute, so far as material to this discussion, was as follows:

"Every railroad company organized or doing business in the state of Kansas shall be liable for all damages done to any employe of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any person sustaining such damage; provided, that notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company, etc." (Laws of Kansas, 1905, Ch. 341, P. 566; Gen. Stat. of Kansas 1905, Sec. 6312.)

By the terms of this statute, the defendant Railway Company was alone liable to the plaintiff for the acts of the resident defendant. Following the general policy of the State of Kansas, the legislature of that State, had not seen fit to hold the employes who committed an act of negligence, liable to their fellow servants injured thereby. This statute was in derogation of the common law, and, in determining the rights acquired under it, must be strictly construed; at least, a forced construction cannot be given to it for the purpose of interpolating a meaning into the act not contemplated by the legislature. It would seem to be unnecessary to resort to construction in order to determine the meaning or extent of this statute; its

terms are plain and unambiguous. There is no need of construction. *St. Paul, M. & M. Ry. Co. v. Sage*, 71 Fed. Rep. 40, 47; *Webber v. St. Paul City R. Co.*, 97 Fed. Rep. 140, 144; *Swartz v. Siegel*, 117 Fed. Rep. 13, 18; *Ayers v. Board of Commissioners*, 37 Kan. 240, 15 Pac. Rep. 229; *M'Allister v. Fair*, 72 Kan. 533, 535, 84 Pac. Rep. 112; *Larned v. Boyd*, 76 Kan. 37, 41, 90 Pac. Rep. 814.

There being no right under the Kansas Fellow Servant Act for joining an employe who was guilty of the negligence, as a defendant, since the statute created no liability as against individual defendants, a joint cause of action could not be stated under this statute against a railway company and its negligent employe. *Prince v. Illinois Central R. Co. et al.*, 98 Fed. Rep. 1, 2; *Henry v. Illinois Central R. Co.*, 132 Fed. Rep. 715.

The following cases illustrate the principle:

In *Chicago, R. I. & P. Ry. Co. v. Stepp, et al.*, 151 Fed. Rep. 908 (C. C., W. D. Mo.), a similar statute of Missouri was under consideration. The statute provided that whenever any person, employe or passenger, should die from an injury occasioned by the negligence of a railway company or any of its employes, "the corporation, individual or individuals" owning or operating such railway company should forfeit and

pay a certain sum as compensation for such death. Suit was instituted against the Railway Company and one of its engineers to recover for a death occurring in Missouri, it being alleged that the death resulted from the negligent manner of running a train in charge of the defendant engineer, and that both defendants were jointly liable to the plaintiff. In holding that the suit was properly removable, District Judge Philips said:

"If this statute does not embrace the engineer in charge of the locomotive, as the servant of the railway company, it is further conceded that there is no joint liability of the company and said Collier, and consequently the case was removable on the petition of the former. This legislation is not revolutionary, but is rather a process of evolution. The corresponding statutes of the state prior to 1899, respecting damages for torts, gave the designated representatives of a deceased employe of a railroad company no right of action against the company for death caused by the fault of a co-employe. The phrase, common to all these statutes, 'Any person,' as employed in the statute, did not include fellow-servants. *Proctor v. Hannibal & St. Joe Railroad Company*, 64 Mo. 112, Rev. St. 1899 (volume 1, p. 729, c. 17 of the damage act), was identical with the antecedent statutes, except that the later statute, after the words, 'any injury is received resulting from or occasioned by any defect or insufficiency,' added the following: 'unskillfulness, negligence, or criminal intent'; and extended the right of action to the adopted children of the deceased.

It must be conceded that these statutes were aimed alone at the master, creating liability on his part for a death caused by his agents, servants, and employes

in the operation of the specified public conveyances, for use in transportation; and that the statute, where death resulted from the fault of the servant or employe, was not intended to carry over to the designated representatives of the deceased a right of action against such servant or employe. . . .

Statutes in derogation of common-law rules of nonliability are to be strictly construed, and where they create new liabilities they are not to be extended by mere implication. Judge Norton in *Proctor v. Hannibal & St. Joe Railroad Company, supra* (64 Mo. 112), said:

'When particular words or particular clauses of a statute are of doubtful import, they should be considered in connection with the entire statute, and in such cases, when such words or clauses literally construed would produce a conflict in the act or lead to absurd conclusions, they may be restricted or enlarged in their operation, so as to cause each part of it to harmonize with every other part.'

Among the recognized canons of construction of statutes are the following: As an aid thereto, it is always to be presumed that the legislature did not intend to enact a law that would lead to absurd or oppressive results; the intent of the law is the prime object to be kept in view in its construction; if the intent cannot be enforced by the literal import of the words employed, it is well settled that the letter of the statute must occasionally be cut down to conform to its evident spirit and purpose; a construction which must occasion great public or private mischief, and injustice must never be preferred to the one which avoids such results. Resulting from these is the rule that where the words are reasonably susceptible of another construction which would avoid such results, consistent with the manifest purpose or scheme of the legislative enactment, such other construction should be adopted. . . The whole history of such legislation, devolving the right of action on the family or

legal representatives of the deceased, and the successive enlargements of such statutes, show that it has been and is the legislative policy and purpose to render the carrier, and not the mere employe, responsible for injuries resulting in death. If it had been the mind of the legislature to extend such penal statute to the mere employe on the locomotive, car, automobile, or stage driver, it was easy to have said so in plain and apt terms. The courts ought not, by forced or strained construction, to imply such purpose, especially when it would lead to absurd and harsh results.

It is scarcely necessary to add that where the petition on its face, as in this case, and the petition for removal show that the actual relation of the local defendant Collier was that of a mere engineer in the employ of the railroad company, against whom no recovery can be had, under the statute on which the action is predicated, the mere subsequent allegations in the petition that 'the defendants' negligently did so-and-so, is ineffective to prevent the railroad company, a non-resident corporation, from removing the case into this jurisdiction."

Likewise, in *Lockard, et al. v. St. Louis & S. F. R. Co.*, 167 Fed. Rep. 675 (C. C., W. D. Ark.), District Judge Rogers held that under the Arkansas statute (Kirby's Dig. Ark., Sec. 6607; Sandels & Hill's Dig. Ark., Sec. 6207) providing that if death shall be caused by certain negligent acts of a railway employe, "the company owning and operating any such railroad shall be liable and responsible, etc.," an employe could not be joined as a defendant so as to prevent the railway company from removing the suit to the United States Court, saying:

"That section gives a right of action to one who is injured in person or property by the failure of those who are running the train, against the company which owns and operates the railroad, for the failure of those running the train to keep a lookout, but it does not give any right of action against the persons who are running the train. This statute is in derogation of the common law. No right of action existed at common law for failure to keep a lookout. The common law only held the railroad company liable for an injury to one trespassing upon its track after the trespasser was discovered by those operating the train, and only when they were guilty of negligence in not avoiding the injury. The rule of construction is that where the statute is in derogation of the common law, it shall be strictly construed, and the provisions of this statute should not be construed to give a cause of action against anyone except the railroad company. If it had been the purpose of the legislature to have given a cause of action against the engineer running the train, it would have been an easy matter to have said so. The Legislature did not say so, and therefore it must follow that it did not intend to give the action."

Since the Fellow Servant Act made the defendant Railway Company alone liable for the alleged negligent act of the resident defendant, there could not, so far as that statute was concerned, be a joint cause of action stated against the defendant Railway Company and the resident defendant; the controversy, under this statute, between the plaintiff and the defendant Railway Company, of necessity was separable, as it was the only possible controversy which could exist under the explicit terms of the act.

The resident defendant, if at all, could be liable to the plaintiff only under the rules of the common law for his personal negligence. Under such circumstances, the controversy between the plaintiff and the defendant Railway Company would still be separable.

The situation is well illustrated by the decision of the United States Circuit Court of Appeals for the Eighth Circuit, in *Jackson v. Chicago, R. I. & P. Ry. Co.*, 178 Fed. Rep. 432. In that case an employe was killed by the discharge of a shotgun alleged to have been negligently placed and carried upon a hand car, where the deceased was required to perform his duties, by a section foreman. An action was brought against the railway company and the section foreman, the latter being a citizen of the same state as the plaintiff, it being alleged that the death of the deceased was due to the joint and concurrent negligence of the defendants. The statute of Nebraska provided:

"That every railway company operating a railway engine, car or train in the State of Nebraska shall be liable to any of its employes who at the time of injury are engaged in construction or repair work, or in the use and operation of any engine, car or train for said company, or, in the case of his death, to his personal representatives for the benefit of his widow and children, if any; if none, then to his parents; if none, then to his next of kin dependent upon him, for all damages which may result from negligence of any of its officers, agents, or employes, or by reason of any

defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works."

This act, like the Kansas Fellow Servant Act, applied to railway companies alone, and did not attempt to create any liability on the part of the employes for whose negligence the railway company was held responsible. In the Jackson case, like the case at bar, the railway company, if at all, was liable under this statute, while the section foreman was liable, if at all, only by the rules of the common law. On this state of facts, the court held that the railway company was entitled to remove the case to the United States Court, as the controversy between it and the plaintiff was necessarily separable. The fundamental difference between an action at common law and a statutory action is well illustrated by the position of this Court in *Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285, where it was held that a cause of action brought under the rules of the common law would not stop the running of a statute of limitations against a statutory cause of action growing out of the same facts.

The case of *State ex rel Iba v. Mosman*, 231 Mo. 474, 133 S. W. Rep. 38, 43, 44, clearly approves the contention of the plaintiffs in error. In that case suit was commenced against the defendant railroad com-

pany and a conductor in its employ, to recover damages for the death of plaintiff's intestate, who, it was alleged, was killed through the joint negligence of the two defendants. Section 2864 of the Revised Statutes of Missouri, 1899 (Revised Statutes of Missouri, 1909, Section 5425), provides for liability on the part of railway companies when death is due to certain designated acts of their employes. Sectons 2865 and 2866 of the Revised Statutes of Missouri, 1899 (Revised Statutes of Missouri 1909, Sections 5426, 5427), provide for liability in case of death by a wrongful act, both by the master and by the employe responsible for the death. In that case, it was alleged in the petition for removal that the cause of action against the defendant Railway Company was under one statute, and the cause of action against the resident defendant was under the other. In discussing this situation, the Supreme Court of Missouri said:

"Is there in the suit of Mary Iba against this railroad company and the individual defendant, the conductor, a separable controversy? In its petition for removal the railroad company says that, if the petition states any cause of action against it, it is under section 2864, Rev. St. 1899, in which the conductor is not involved, and that if there is any cause of action stated against the conductor it is under sections 2865 and 2866, in which the railroad company is not concerned. If that is the correct interpretation of the plaintiff's petition, the cause was removable on the separable controversy theory; otherwise not."

These cases establish the rule that where a suit is brought against one defendant under the exclusive terms of a particular statute, precluding action against the other defendant, and against such other defendant upon a different rule of liability, the controversy between the plaintiff and a non-resident defendant is separable and the cause removable to the United States Court. While the defendant Railway Company might be liable under the Kansas statute, and the resident defendant under the rules of the common law, neither the defendant Railway Company nor the resident defendant could be liable both under the statute and at common law. With the controversy against either defendant the other is not concerned. A suit might have been brought against the defendant Railway Company under the Kansas statute, or against the resident defendant under the rules of the common law, and these controversies completely adjudicated between them without the presence of the other defendant; in fact both the statute and the rules of the common law preclude any other situation. A judgment might be rendered against one defendant and in favor of the other, under such circumstances, and such judgment against either defendant would not be a bar to a suit upon the other, except so far as the question of damages is concerned, and that would not be because the

causes of action were joint, but because a party having once obtained damages, in whatever way, for a certain injury, cannot, thereafter, recover additional damages from another person for the same injuries, irrespective of the fact that he may have a cause of action against the latter person; the reason being that a party can have but one satisfaction for his injury. By way of illustration: if the resident defendant had seen fit to purchase his freedom from suit from the plaintiff, but not in satisfaction of the plaintiff's injury, and obtained a release, so qualified, it would not have barred an action against the Railway Company.

If at all, the resident defendant was liable to the plaintiff for his personal negligence; the cause of action against him was an action *ex delicto*. If at all, the cause of action against the defendant Railway Company on account of the negligence of the resident defendant, arose under the Kansas Fellow Servant Act, and was dependent upon a contract obligation of the Railway Company to the plaintiff, which the law implies from the relation of master and servant, and is, therefore, an action *ex contractu*. The plaintiff has, therefore, sought to join in the petition an action *ex delicto* with an action *ex contractu*, under circumstances which made it apparent that the cause of action against either of the defendants is one in which

the other is in no particular interested. The alleged cause of action against the resident defendant is for a breach of his general obligation not to injure another; while the alleged cause of action against the Railway Company is for a breach of an obligation created by statute and based upon the contractual obligation between the plaintiff and the Railway Company. The first is purely an action of tort; the second is purely an action on contract. In the State of Kansas such actions can never be united, except under circumstances which do not exist in this case. Speaking of this matter in *Hoye et al. v. Raymond*, 25 Kan. 665, 667, Mr. Justice VALENTINE said:

> "Causes of action in tort can only be united with causes of action on contract, where they all arise out of the same transaction, or transactions, connected with the same subject of action. (Civil Code, Sec. 83.) But even then they cannot be united unless they all 'affect all the parties to the action,' except in actions to foreclose mortgages or other liens."

The resident defendant is not affected by the action against the Railway Company under the Kansas Fellow Servant Act. He has no concern with the responsibility created by that statute. The act excludes him from any obligation created by its terms. The Railway Company is in no way affected by the action against the resident defendant; as it is based upon the common law, under which the Railway Company can-

not be held liable. It must follow as a matter of course that an attempted joinder of actions which is not authorized by the laws of Kansas, cannot prevent the removal of the controversy between the plaintiff and the defendant Railway Company, as such controversy is separable. In the language of the Court in *Veariel v. United Engineering and Foundry Co.*, 197 Fed. Rep. 877 (D. C., N. D. Ohio):

> "It naturally follows that if, under the law of Ohio, the joinder of parties defendant is improper, then this cause of action contained in the petition is separable, and in so far as the United Engineering and Foundry Company is concerned can be removed to this Federal Court."

It is respectfully submitted, that neither under the Kansas statutes nor under general rules of pleading can the causes of action alleged in the petition in question be united so as to present an action for a joint recovery, and that the unauthorized joinder of these several causes of action by the plaintiff was ineffectual to prevent the removal of the action to the United States Court.

The Decisions of This Court in Cases Construing the Provisions of the Removal Act, Do Not Establish Rules Contrary to the Contentions of the Plaintiffs in Error.

The cases decided by this Court in which it has been held that a separable controversy, within the meaning of the Act of Congress, did not exist, are, without exception, suits where the plaintiff having the option to bringing a joint or several action, exercised the privilege and alleged facts in the petition which, if true, showed a joint cause of action against all of the defendants. In *Louisville & N. R. Co. v. Ide*, 114 U. S. 52; *Pirie, et al. v. Tvedt, et al.*, 115 U. S. 41; *Sloane, et al. v. Anderson*, 117 U. S. 275; *Stone v. South Carolina*, 117 U. S. 430; *Plymouth Gold Mining Co. v. Amador Canal Co.*, 118 U. S. 264; *Little, et al. v. Giles, et al.*, 118 U. S. 596; *East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240; *Torrence v. Shedd*, 124 U. S. 527; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599; *Whitcomb v. Smithson*, 175 U. S. 635; and *Chicago, R. I. & P. Ry. Co. v. Martin*, 178 U. S. 245, the allegations of the respective petitions showed that all of the defendants jointly and concurrently participated in the only act of which complaint was made. The respective plaintiffs in these suits, as a matter of course, had the option of suing the defendants jointly or severally, and having chosen to sue them jointly, the cause of action which the plaintiff insisted was joint, and which was joint, if the allegations of the petition were true, could not be made separable at the

option of any one of the defendants. (Appendix, pages 70 to 78.)

In *Powers v. Chesapeake & O. Ry. Co.*, 169 U. S. 92, while the question was not for decision, this Court took occasion to lay down a rule, necessarily fundamental, to the effect that an action of tort which might have been brought against many persons or against any one or more of them, and which is brought in a State court against all jointly, contains no separate controversy sufficient to authorize its removal by some one of the defendants. (Appendix, page 78.)

Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92; *Chesapeake & O. Ry. Co. v. Dixon*, 179 U. S. 131; *Cincinnati, N. O. & T. P. Ry. Co. v. Bohon*, 200 U. S. 221; *Southern Railway Co. v. Carson*, 194 U. S. 136; *Illinois Central R. Co. v. Sheegog*, 215 U. S. 308; *Southern Railway Co. v. Miller*, 217 U. S. 209; and *Chicago, B. & Q. R. Co. v. Willard*, 220 U. S. 413, were suits in which the laws of the State where the respective cases were commenced made the respective causes of action set forth in the petition joint or several at the option of the plaintiff. In each of these cases the statutes and laws of the State where they were commenced made the various defendants jointly liable for the causes of action set forth in the petition. Under such circumstances, it is manifest that a single defend-

ant could not, by any allegations in a petition for removal, make separable a cause of action which the statutes of the State made joint. (Appendix, pages 78 to 89.)

The case of *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206, to which reference is so frequently made, is not an authority sustaining the contention that the case at bar was not removable upon the petition of the defendant Railway Company. The decision in that case, being an answer to a certified question, was that a joint action brought against a railway company and its servants for the purpose of holding the railway company liable for the negligent acts of the servants who were made defendants, could not be made separable at the option of the defendant railway company. It is well settled that an action which a plaintiff seeks to make joint cannot be made separable by one of the defendants jointly sued, but this presupposes the fact that the plaintiff has filed a petition alleging a joint cause of action against the defendants. The question certified in the Thompson case clearly recognizes this fundamental proposition.

While the Kansas statute permitted a pleader, under certain circumstances, to unite several causes of action in one petition, and in this single suit to litigate those several causes of action, this did not make such causes

of action joint. It is perhaps true, as announced by this Court, that a court cannot say that a cause of action is separable which the plaintiff by his petition has sought to make joint, neither is it within the power of the court to declare that a cause of action is joint, when, as here, the statute of the State where the cause of action arose and where the suit is commenced does not authorize him to do so. This Court, in rendering the decision in the Thompson case, said:

"In the present case there is nothing in the question propounded which suggests an attempt to commit a fraud upon the jurisdiction of the Federal courts. . . . In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the State court by the filing of a declaration in which he alleged a joint cause of action."

The Thompson case was based upon the assumption that the cause of action was what the plaintiff in good faith said it was. This was necessarily so, as the certified question was so limited, and this Court was careful to call attention to the fact that the decision was made without reference to any State statue, "as its effect is not presented in the questions propounded." The question certified presupposes the statement of a joint action against all of the defendants for their joint and concurrent negligence, and one not only made in good faith, but under circumstances giving the plaintiff the choice of an action against any one of

several joint tort feasors or a joint action against all. In this light, neither the question certified, nor the answers thereto, are applicable to the case at bar. In the discussion of the Thompson case, it is interesting to recall, that, by the express provision of the statutes of Tennessee, where the action was commenced, a railway company and its employes are both made jointly liable for damages resulting from death or injury due to the negligence of the employes. (Shannon's Anno. Code of Tenn., 1896, Sections 1574-1576, 4025-4029, 6482-6486.)

In no case has the right to a removal been denied by this Court where the joinder was not expressly authorized by either the constitution or the statute of the State where the suit was begun. The decisions of this Court have gone only to the extent of holding that where an action is commenced against several defendants, who, by the laws of the State where the suit is begun, are either jointly or severally liable to the plaintiff, at his option, a non-resident defendant has no right to say that an action which the plaintiff has sought to make joint, and which the laws of the State where the suit is commenced permit him to make joint, at his option, shall be separable.

The case at bar presents an altogether different situation, as the joinder of the defendant Railway Com-

pany with the non-resident defendant was not permitted by the laws of Kansas. The Supreme Court of the State of Kansas in holding that the petition for removal in the case at bar was properly denied, (*Dowell v. Chicago, R. I. & P. Ry. Co. et al.*, 83 Kan. 562, 112 Pac. Rep. 136; transcript, 19) based its ruling upon the decisions of this Court in the Ide, Powers, Dixon, Bohon and Thompson cases, *supra*, but it is respectfully submitted that the facts in those cases and the rules of law applicable thereto are wholly dissimilar from those involved in this case, and that the Supreme Court of Kansas, in holding that this case was not removable upon the authority of those cases, misconceived the fundamental distinction between them and the facts and principles by which the decision of this case must be controlled.

The Facts Alleged in the Petition for Removal, as well as the Evidence, Created a Controversy which the State Court was Without Power to Determine.

In the petition for removal, it was alleged, among other things, that the plaintiff did not have a cause of action against the resident defendant, nor any reasonable ground upon which to base a cause of action against him; that the resident defendant could not,

under any circumstances, be made a proper party defendant nor subjected to a proper judgment in said cause; that the resident defendant was joined as a defendant by the plaintiff for the sole and fraudulent purpose of defeating and preventing the Railway Company from removing the action to the United States Court. (Transcript, 5-7.) Upon issue being joined, the State court denied the petition for removal. (Transcript, 10.)

Whether or not the facts pleaded were sufficient to support the conclusion of fraud, was a question with which the State court was not concerned; it was exclusively a matter for the Federal Court to determine. All questions of fact must be heard and determined by the United States Court, and, therefore, must be taken as true by the State court when a petition for removal is presented. *Stone v. South Carolina*, 117 U. S. 430, 432; *Carson v. Hyatt*, 118 U. S. 279; *Burlington, C. R. & N. Ry. Co. v. Dunn*, 122 U. S. 513, 515; *Crehore v. Ohio & Mississippi Ry. Co.*, 131 U. S. 240; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298; *Kansas City Suburban Belt Ry. Co. v. Herman*, 187 U. S. 63, 70; *Madisonville Traction Co. v. Mining Co.*, 196 U. S. 239; *Chesapeake & O. Ry. Co. v. Mc-*

Cabe, 213 U. S. 207; *Texas & Pacific Ry. Co. v. Eastin*, 214 U. S. 153.

In the case of *Illinois Central R. Co. v. Sheegog*, 215 U. S. 308, 316, Mr. Justice HOLMES said:

"And further, there is no doubt that the allegations of fact, so far as material, in a petition to remove, if controverted, must be tried in the court of the United States, and therefore must be taken to be true when they fall to be considered in the State courts."

In the case at bar, it was not possible to make a more detailed statement, in the petition for removal, of the fraudulent acts committed by the plaintiff by which he sought to deprive the Railway Company of the right to remove the cause. The fact was alleged that the plaintiff had charged the resident defendant with an act of negligence, when, under no circumstances, could there be a cause of action against him, and with the sole and fraudulent intention of depriving the Railway Company of its right to remove the suit. While the plaintiff may, in good faith, proceed in a State court upon a cause of action which he alleges to be joint, it is equally true that the Federal Courts should not sanction devices intended to prevent a removal to a Federal Court where the right exists, and should be as equally vigilant to protect the right to proceed in the Federal Court as to permit the State court, in proper cases, to retain its own jurisdiction.

Wecker v. National Enameling and Stamping Co., 204 U. S. 176; *Illinois Central R. Co. v. Sheegog, supra.*

After the petition for removal was denied, the cause was tried, and the plaintiff, on cross-examination by the attorney for the resident defendant, testified as follows, with reference to his intent and purpose respecting a judgment against the resident defendant:

"Q. Had you, or not, stated to a number of people that you didn't blame Johnson for this accident? A. Blame Johnson?

Q. That you didn't blame him any? A. I never made any such statement.

Q. Never made any such statement to anybody? A. No, sir. Dr. Smith took my statement. He asked me who to blame. I said I didn't know. He said, 'You just as well blame the engineerman. You have to blame somebody.'

Q. And then from that you blamed the engineer, Johnson, upon the suggestion of Dr. Smith, did you? A. Of course; I didn't know what else to say.

Q. You didn't know what else to do but to lay it onto Johnson? A. I guess it was according to the answer I made to Dr. Smith.

Q. And you brought this suit against Johnson and also against the Railway Company? A. Yes, sir.

Q. Didn't you bring this suit against Johnson to avoid having this case carried to Wichita and tried in the Federal court? Didn't you make Johnson a defendant in this case for the purpose of preventing the Railway Company from taking this case out of the District Court here and taking it to Wichita? A. The lawyers brought the case. I don't know what they brought it that way for.

. . . . . .

Q. Wasn't that the reason that you joined Mr.

Johnson as one of the defendants in this case? A. Wasn't that the reason?

Q. Yes. A. I don't know what the reason was.

Q. You did that in order to have the case tried here, didn't you? A. The lawyers brought the suit, fixed it up for me.

Q. Are you expecting any judgment against Johnson? A. No, sir.

. . . . . .

Q. When you brought this suit did you expect to recover any money from the defendant Johnson in this case? A. I did not.

Q. State whether or not it is true you are depending entirely upon a judgment against the railway company in this case and not on a judgment against Mr. Johnson? A. Yes, sir.

Q. And that was your intent at the time you commenced this suit? A. My expectation at the time I brought this suit?

Q. And intention at the time you brought this suit? A. Yes, sir. (Transcript, 11-14.)

The evidence also showed that the resident defendant had no duty to perform with respect to ringing the bell on the engine for the purpose of giving warn- of its movements.

Whatever may be said with respect to the allegations of fact in the petition for removal, the evidence of the plaintiff demonstrated that the joinder of the resident defendant was not in good faith, and that neither at the time the suit was commenced nor at the time of the trial, was there any intention to hold the resident defendant personally liable, either singly or

jointly with the Railway Company, for the injury to the plaintiff. Following this testimony, the Railway Company refiled its petition and bond for the removal of the suit to the United States Court. The State court overruled the petition for removal, but, under this evidence, submitted to the jury the question of the good faith of the plaintiff in joining the resident defendant. The jury was instructed that if they found that the resident defendant was not joined as a defendant with any hope or intention of finally asking for the recovery of judgment against him, but for the purpose of preventing the Railway Company from removing the suit to the Federal Court, they should discharge the resident defendant. (Transcript, 14.) It is respectfully submitted that whenever—during the trial or at the close of the plaintiff's evidence—it becomes apparent that a resident defendant was not joined for the purpose of securing judgment against him, but for the purpose of preventing the removal of the suit to the United States Court, the trial court, upon request should remove the cause to the United States Court. In the case at bar, the evidence that the plaintiff at no time intended asking for or securing a judgment against the resident defendant and that the resident defendant was not responsible for the signals on the engine, raised issues of fact with respect to his fraud-

ulent joinder which was for the determination of the Federal Court alone, and not for the determination of the jury in the State court. *Illinois Central R. Co. v. Coley*, 121 Ky. 385, 89 S. W. Rep. 234; *Dudley v. Illinois Central R. Co.*, 96 S. W. Rep. 835, 837; *Underwood's Admr. v. Ilinois Central R. Co.*, 103 S. W. Rep. 322, 323.

As Mr. Justice MILLER said in *Arapahoe Co. v. Ry. Co.*, 4 Dill. 277:

> "It would be a very dangerous doctrine—one utterly destructive of the rights which a man has to go into the Federal courts on account of his citizenship—if the plaintiff in the case in instituting his suit can without any right or reason, or just cause, join persons who have not the requisite citizenship and thereby destroy the rights of parties in Federal courts. We must therefore be astute not to permit devices to become successful which are used for the purpose of destroying that right."

Aside from the Allegations of Negligence with Respect to the Conduct of the Resident Defendant, there were Separable Controversies between the Plaintiff and the Defendant Railway Company.

The charge of negligence in the petition against the resident defendant was that he negligently and carelessly ran a switch engine, in his charge as engineer,

upon the plaintiff. (Transcript, 3.) In addition to the above charge of negligence the petition contained distinct charges of negligence against the Railway Company itself. These allegations were as follows:

"Plaintiff further says that said engineer Ed Johnson was incompetent, unskilled and unfit to discharge the duties as an engineer at the time he was employed to discharge such duties by the defendant Railway Company, as said Railway Company well knew, and that he has been unskilled, unfit and incompetent as the defendant Railway Company well knew, but all of which this plaintiff was at all times ignorant." (Transcript, 3.)

The petition further charges:

"Plaintiff says further, that said engine above mentioned was old and worn, defective and unsafe in that it leaked steam into its cylinder and would not stand when left alone, but would move without the intervention of human or outside agency, and the appliances and machinery of said engine for starting and stopping same were so defective that the same would start and stop without reference to said machinery and would not respond to the operation of said machinery; that said engine was without proper, sufficient or safe driving wheel brakes, all of which was well known to the defendants at all the times herein mentioned, but all of which the plaintiff was at all times ignorant. . . . Plaintiff says that said engine was being used by the defendants at the time in and about the carrying on of inter-state traffic between the State of Illinois and the Territory of Oklahoma." (Transcript, 3, 4.)

The negligence relied upon for recovery is then recapitulated as follows:

"That the injury to plaintiff was the direct and proximate result of the unfitness and incompetency of the defendant, Ed Johnson, and of the negligence and carelessness of said Ed Johnson in carelessly, recklessly and needlessly running said engine upon and against the said plaintiff, and of the careless failure of said Ed Johnson in neglecting to use proper precaution to observe and avoid running upon and injuring the said plaintiff at the time and place in question, and in the carelessness of the defendant Railway Company in employing the said Ed Johnson as engineer and in retaining him and allowing him to act as engineer at the time and place in question, and in the carelessness of the defendant Railway Company in knowingly retaining and using said defective engine at said time and place, and in carelessly failing to take proper precaution to prevent injury to said plaintiff at said time and place while engaged in the discharge of his duty as employe of said defendant Railway Company." (Transcript, 3-4.)

It is manifest, therefore, that the plaintiff sought to recover from the defendant Railway Company, not only for the alleged act of omission on the part of the resident defendant, but principally for the negligent and careless acts of the Railway Company itself. If it be conceded, for the purpose of argument, that the petition showed on its face a charge of joint negligence concurred in, as a matter of law, by the defendant Railway Company and the resident defendant such as authorized the State court to deny a removal, on account of such charge; nevertheless, the controversy between the plaintiff and the Railway Company with

respect to the distinct allegations of negligence on the part of the Railway Company itself, in carelessly and negligently employing and retaining in its employment an incompetent servant, in furnishing an improper locomotive, in violation of the Safety Appliance Act, and in failing to take proper precaution against such accidents, were plainly separable, and the cause was removable under the terms of the second section of the Removal Act. That portion of the act, which is pertinent, reads as follows:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district." (25 Stat. 434; U. S. Comp. Stat. 1901, p. 507.)

By the express provision of this statute, it is recognized that in any suit there may be several causes of action, some of which may not be removable, but that if in any one of them there is a controversy which is entirely between citizens of different states and which can be fully determined between them, then the defendant actually interested in such controversy may remove the suit to the Federal Court for the proper district, if the amount in controversy is sufficient. Following the provisions of the statute, the petition

for removal alleged that there was a separable controversy between the plaintiff, and the Railway Company, which could be fully determined between them, and the whole subject-matter thereof finally adjudicated and complete relief afforded, as to such separate controversy, without the presence of the other defendant.

In the controversy between the plaintiff and the Railway Company as to whether the latter was liable to the former for the alleged acts of negligence of the Railway Company in carelessly and negligently employing and retaining in its employment an incompetent servant, and in using a defective locomotive, in violation of the Safety Appliance Act, and in failing to take proper precaution against such accidents, which were alleged to be among the direct and proximate causes of the injury to the plaintiff, the resident defendant was not and could not be interested. The controversy between the plaintiff and the Railway Company and the resident defendant as to the liability of all or either of the defendants for the alleged omissions of the resident defendant was a thing apart. The petition raised three distinct issues: (1) The question of the liability of the resident defendant for his alleged acts of omission; (2) the question of the liability of the Railway Company for the alleged negli-

gence of the resident defendant; (3) and the distinct question of the sole liability of the Railway Company for its alleged negligence in employing and retaining in its service an incompetent servant, in furnishing a defective engine, in violation of the Safety Appliance Act, and in failing to take proper precautions against such accidents, all of which, it was charged, were directly responsible for the injury. The controversy as to the liability of the Railway Company for this third subdivision is on distinct grounds, with which the resident defendant could not, by any process of reasoning, be interested. A separate suit might have been brought on these latter causes of action and this separate controversy settled, as between the plaintiff and the Railway Company, without the presence of the resident defendant; in fact, in such a controversy, the resident defendant could not have been made a party. The liability of the Railway Company to the plaintiff for its own alleged negligence could have been determined under this petition only by a consideration of the causes of action in said third subdivision, and this separate controversy must, of necessity, be settled in these counts, to the exclusion of the other allegations of negligence and of the resident defendant. The explicit terms of the statute provide for such a situation, and anticipate that in any suit there may be

several and different controversies, any one of which, if "wholly between citizens of different States, and which can be fully determined as between them," may be removed to the United States Court by any defendant actually interested in such controversy. The distinct allegations of negligence on the part of the Railway Company itself clearly present controversies which were removable to the United States Court under the terms of the Federal act.

In the early case of *Fraser v. Jennison*, 106 U. S. 191, 194, Mr. Chief Justice WAITE held that the test of removability, under such circumstances, was as follows:

"To entitle a party to a removal under the second clause of the second section of the act, there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other."

Later in the opinion, he said:

". . . the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun."

In *Barney v. Latham*, 103 U. S. 205, 214, a suit was brought by plaintiffs, citizens of Minnesota and Indiana, respectively, against defendants, citizens of other States, and a Minnesota corporation. It was claimed that the State of Minnesota received from Congress certain lands to aid in the construction of railroads within that State, and that the benefit of the grant was transferred by that State to a certain railroad company, with authority to construct a line within that State. It also appeared that the individual defendants had constructed a portion of the proposed railroad for such railroad company, and had thereby become entitled to a certain amount of the land received from Congress, which the railroad company agreed, in consideration of its indebtedness to these persons, to convey to them. It was alleged that the predecessor of the plaintiffs contributed one thirty-seventh of the money used in the construction of the road, and to that extent they were entitled, in equity, to a proportionate undivided share of the lands earned. The individual defendants incorporated themselves under the general laws of the State of Minnesota as the Winona and St. Peter Land Company, to which, by their direction, the said railroad company conveyed the lands which were earned by the construction of the road. This land company was the resident defendant. The

specific relief asked for was that the individual defendants be required to account to the plaintiffs for money which came to their hands from sales of certain of the lands; that the plaintiffs be adjudged the owner of a certain proportion of the unpaid contracts and securities in the hands of the land company; that the land company be required to account to the plaintiff for all lands sold by it subsequently to the conveyance from the railroad company; and that the land company be required to convey to them a certain proportion of all the unsold lands. The individual defendants, being non-residents of the State, asked for a removal to the Federal Court, on the ground that the controversy between the plaintiffs and them was separable, under the Act of March 3, 1875, which contained a provision identical with that now under consideration. In holding that there was a separable controversy, and that the suit was removable to the United States Court, Mr. Justice HARLAN said:

"The complaint, beyond question, discloses more than one controversy in the suit. There is a controversy between the plaintiffs and the Winona and St. Peter Land Company, to the full determination of which the other defendants are not, in any legal sense, indispensable parties, although, as stockholders in the company, they may have an interest in its ultimate disposition. Against the latter, as a corporation, a decree is asked requiring it to convey to the plaintiffs the undivided two-ninths of one thirty-seventh of cer-

tain lands, and to account for the proceeds of the lands by it sold subsequently to the conveyance from the railroad company.

But the suit as distinctly presents another and entirely separate controversy, as to the right of the plaintiffs to a decree against the individual defendants for such sum as shall be found upon an accounting, to be due from them upon sales prior to the conveyance from the railroad company. With that controversy the land company, as a corporation, has no necessary connection. It can be fully determined as between the parties actually interested in it without the presence of that company as a party in the cause. Had the present suit sought no other relief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not cease to be one wholly between the plaintiffs and those defendants because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and the land company. When the petition for removal was presented, there was in the suit, as framed by plaintiffs, a controversy wholly between citizens of different States, that is, between the plaintiffs, citizens respectively of Minnesota and Indiana, and the individual defendants, citizens of New York, Wisconsin, and Massachusetts. And since the presence of the land company is not essential to its full determination, the defendants, citizens of New York, Wisconsin, and Massachusetts, were entitled, by the express words of the statute, to have the suit removed to the Federal Court."

In the case at bar, it cannot be said that the suit was a unit. There could, under the several allegations of the petition, be a verdict against the Railway Company and in favor of the resident defendant. A pos-

sible and proper judgment need not have been joint. Whenever it appears, as here, that a controversy between the plaintiff and the removing defendant is separate and distinct and that the other defendant is not interested therein, a removal is proper. *Beuttel v. Chicago, M. & St. P. Ry. Co. et al.*, 26 Fed. Rep. 50; *Elkins v. Howell*, 140 Fed. Rep. 157; *McGuire v. Great Northern R. Co.*, 153 Fed. Rep. 434, 439; *Wheeling Creek Gas, Coal & Coke Co. v. Elder*, 170 Fed. Rep. 215; *Harter v. Kernochan*, 103 U. S. 562; *Connell v. Smiley*, 156 U. S. 335, 341.

It is true that a separate controversy is not identical in signification with a separable cause of action, as there may be separate remedies against several parties for the same cause of action, there being but one subject-matter of the controversy in question; but where there are, as here, separate and distinct causes of action in the same suit, either of which might have been sued upon alone, then there are separate controversies within the meaning of the statute. *Gudger v. Western N. C. R. Co.*, 21 Fed. Rep. 81, 83.

In *Boatmen's Bank v. Fritzlen*, 135 Fed. Rep. 650, 653, Circuit Judge Sanborn, in discussing the separable controversy clause of the second section of the Removal Act, held that the test of removability under this clause was as follows:

"Separate and distinct causes of action disclosed by the record in a single suit, upon either of which a separate suit could have been maintained, and the determination of neither of which is essential to the disposition of the other, constitute separate controversies within the meaning of the acts of Congress."

This rule was expressly approved by this Court in *Fritzlen v. Boatmen's Bank*, 212 U. S. 364, 373. And in *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 432, Mr. Justice MCKENNA laid down the rule with respect to separable controversies, in the following language:

"A suit may, consistently with the rules of pleading, embrace several distinct controveries. *Barney v. Latham*, 103 U. S. 205, 212. It was said in *Hyde v. Ruble*, 104 U. S. 409: 'To entitle a party to a removal under this clause (second clause of Section 2 of the Act of 1875, same as second clause in the Act of 1887), there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other.' In other words, as expressed in *Fraser v. Jennison*, 106 U. S. 191, 194, 'the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun.' And when two or more causes of action are united in one suit there can be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants (now only the defendants) interested in the controversy, which if it had been sued on alone would be removable."

It is submitted that under the decisions of this Court, the case at bar was removable upon the application of the Railway Company, as it presented at least two controversies with respect to which the Railway Company was not only the necessary defendant, but the only one possible, under the circumstances, on each side of which is a citizen of a different State from that on the other, and in which the other jurisdictional prerequisites are present. These controversies could and must be fully determined without the presence of the other party to the suit, as it was begun. They could have been removed if sued upon alone. So far as these controversies were concerned, the allegations of the petition precluded a consideration of the responsibility of the resident defendant therefor.

The rule in other courts, under similar circumstances, is well settled.

In *Chicago & A. Ry. Co. v. New York, L. E. & N. R. Co. et al.*, 24 Fed. Rep. 516, 517 (C. C., S. D. N. Y.) a bill was filed to restrain the defendants from violating the conditions of several contracts, for an accounting and for damages. One cause of action against the defendants was founded upon an alleged breach of a particular clause of the agreement, whereby each defendant covenanted to make good any deficiency in the earnings of the plaintiff necessary to pay the plain-

tiff's interest upon an issue of bonds in proportion to which each defendant might respectively receive gross earnings accruing from its traffic with the plaintiff. The court held that this undertaking was not joint, but several and distinct, and that the liabilty of each defendant was measured by its own proportion of gross earnings received from traffic with the plaintiff, and that the defendants were not sureties, or answerable for each other's default. And in holding that the cause of action was separable and removable, upon the petition of the non-resident defendant, the court said:

"Although a joint accounting is demanded, the liability of each defendant is several, and the complainant cannot convert a controversy which is wholly between itself and each of the two defendants into one between itself and both defendants, by treating it as joint in the prayer for relief. It is only where the cause of action is founded upon a joint and several liability that a plaintiff may, at his election, proceed against both defendants jointly or each severally."

In *Fergason v. Chicago, M. & St. P. Ry. Co.*, 63 Fed. Rep. 177, 178, 180 (C. C., N. D. Iowa) suit was brought by a switchman in the employ of the defendant railway company against the railway company, its yard master and the engineer in charge of the switch engine which ran over the plaintiff's leg. In overruling a motion to remand the case to the State court, District Judge Shiras said:

"If the plaintiff in fact counts or declares upon one cause of action, and no more, then the case cannot contain a separable controversy. If, however, the petition in fact contains more than one cause of action, then a separable controversy exists; and, if the requisite diversity of citizenship exists between the adversary parties thereto, a ground for removal may thus be shown. . . . The petition in fact counts upon two causes of action—one, the failure to furnish a properly equipped switch engine; the other, negligence in the handling of the engine after plaintiff had been thrown upon the track. The first cause named exists only against the railway company, and is wholly distinct from the second cause of action. If it be true that the engine was not properly constructed, and was lacking in appliances needed for the safety of the men employed thereon, then this breach of duty existed from the time the engine was put to work as a switch engine; and thus a cause of action existed against the company from that time, which would ripen into a right of action in favor of an employe whenever such employe received injury by reason thereof. The cause of action for the negligent handling of the engine and failure to exercise a proper lookout did not arise and was not in existence until the parties in charge of the engine undertook to move the engine along the track upon which plaintiff was injured. The first cause of action is based upon alleged negligence of the master in failing to furnish proper machinery; the second, upon alleged negligence of the co-servants of the plaintiff in the handling of the engine. Under the rules of the common law, the first is a cause of action against the railway company, but the second is not. The first cause is therefore based upon the legal duty, imposed by the common law upon the master, but not upon the employes, of furnishing safe machinery for the use of its servants, whereas the second cause, so far as the railway is concerned, is based upon the statute of Iowa, which makes the railway

company liable, under given circumstances, for the negligence of its servants resulting in injury to a co-employe. It seems clear, therefore, that this suit is clearly separable into parts, and in fact, upon the trial, must be so separated; and that, when thus separated, there is presented a controversy between the plaintiff and the railway company over the question whether the engine used for switching purposes in the yard at Sioux City was or was not properly constructed and equipped, and to this controversy the defendants Smith and Pollard are not parties. If this be true, then, as the suit involves a controversy wholly between citizens of different states, it was properly removed by the defendant company, and the motion to remand must be overruled."

In *Batey v. Nashville, C. & St. L. Ry. Co. et al.*, 95 Fed. Rep. 368 (C. C., M. D. Tenn.), suit was brought against the railway company and the Pullman Company, it being alleged that the plaintiff, a passenger on a sleeping car, was thrown from his berth by the negligence of the railway company in operating its train, and by the negligence of the Pullman Company in not providing proper means to prevent the plaintiff from being thrown from his berth. It was held that the controversy between the plaintiff and the railway company was separable as the cause of action against it was distinct, and with which the co-defendant had no concern.

In *Gustafson v. Chicago, R. I. & P. Ry. Co. et al.*, 128 Fed. Rep. 85, 89-90, (C. C., W. D. Mo.) a case arising in the State of Missouri, suit was brought by an

employe against the railway company and a resident employe, it being alleged, among other things, that the railway company had negligently failed to make proper rules for running its trains, or to put up proper station signals, and required the train to be negligently run at a speed of fifty miles an hour. In holding that this was a separable controversy which entitled the railway company to a removal, District Judge Philips, said:

"It is to be observed in the first place, that if it be conceded that it was the duty of the defendant railway company to establish a schedule time table for the running of trains over the road at the point in question, to establish proper station boundaries at the yard limits at Harlem, and to set up signs, posts, and visible objects to indicate the yard limits of said station, and that it failed of its duty in this respect, what possible connection had the defendant Hanna, an engineer, with such matters? These duties and obligations devolved upon the master alone. So that if these acts of negligence contributed to the injury in question, as it must be assumed the pleader intends by inserting them in the petition, there was no co-operation therein by the defendant Hanna, and consequently no joint cause of action for these derelictions of duty is stated. And it would entitle the defendant railway company, who alone is responsible for such dereliction, to remove the whole controversy into this jurisdiction."

In *Henry v. Illinois Central R. Co. et al.*, 132 Fed. Rep. 715, 717-718, (C. C., S. D. Iowa) suit was brought against a railroad company and an engineer of one

of its trains for negligently causing the death of plaintiff's intestate. Acts of negligence which were essential to make out a cause of action against the railroad company under the State statute, were alleged, with which its co-defendant had no concern. In view of this situation, District Judge McPherson held that the suit contained a separable controversy which was removable to the United States Court, saying:

"To hold that this action is not separable is to so hold in the face of the fact that evidence of negligence can be introduced against the company of acts of which Chapman (the co-defendant) had nothing whatever to do, and, in the very nature of things, could not have been connected with. In my judgment, the action is separable."

This language might be used with respect to the situation before this Court, with equal force.

The position of the Railway Company in the case at bar is fully shown and approved by the decision of the Supreme Court of Georgia in *Southern Railway Co. v. Edwards*, 115 Ga. 1022; 42 S. E. Rep. 375. The syllabus, which was by the court, is as follows:

"Although there may, in a suit against two or more defendants, one of whom is a non-resident, be charges of concurrent negligence against all, yet if there be also a distinct charge of negligence against the non-resident alone, sufficient in and of itself to give rise to a cause of action, the case is one involving a separable controversy between citizens of different States,

and therefore removable to the proper United States court."

And in the opinion, the court, by Presiding Justice LUMPKIN, said:

"An action was brought by Edwards, an employe of the Southern Railway Company, against it and Russell, one of its engineers, for personal injuries which Edwards suffered in consequence of having been struck by a lump of coal which fell from the tender of a passing locomotive of which Russell was in charge. The company, which is a non-resident of this State, is here upon a bill of exceptions assigning error upon the refusal of the trial court to grant an order removing the case to the Federal Court. The plaintiff in his petition alleges that both the company and Russell were guilty of a number of specified acts of negligence, one of which was overloading the tender with coal. It is in one paragraph of the petition also alleged that the company was negligent 'in not providing said engine with an engineer who was careful and prudent, and who would not have permitted said tender to be thus overloaded.' In *Railway Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, it was held that, 'when concurrent negligence is charged, the controversy is not separable.' The decision in this case therefore seems to be authority for the proposition that, in so far as related to the joint acts of negligence, the case made by the plaintiff's petition would not be one which could properly be removed to the United States court. Be this as it may, however, we are quite confident that, because of that paragraph of the petition specially mentioned above, the case was removable. That paragraph certainly did not charge an act of 'concurrent negligence,' for it cannot be true that the company's negligence in providing a careless and incompetent engineer was an act in which the latter participated. Indeed, the plaintiff does not un-

dertake to allege that this was so, but makes his charge of negligence with respect to employing an incompetent engineer against the company alone. As to this particular matter, therefore, there was a 'separable controversy' between the plaintiff and the company. The alleged negligent act of employing such an engineer, with resulting damage to the plaintiff, would, in and of itself, have given rise to a distinct cause of action, involving a controversy wholly between citizens of different States, and a suit of this kind would certainly have been removable. It makes no difference that in the present case such a controversy exists in connection with others that may not be separable. The fact that there is in the suit 'a controversy which is wholly between citizens of different States, and which can be fully determined as between them' brings the case within the removal act of 1887. Black, Dill. Rem. Causes, sec. 139. See, also, section 143, and cases cited. That there is a separable controversy must appear from the plaintiff's pleadings. Id., sec. 141. When removal is proper, the effect is to carry the entire case into the Federal Court. Id., sec. 142. The court erred in not granting the order of removal."

The charge of negligence in the case at bar was identical. It was not claimed that the negligence of the Railway Company in providing an unfit and incompetent engineer was an act in which the resident defendant participated. The charge was that the Railway Company was alone responsible, among other reasons, because of its negligence "in the carelessness of the defendant Railway Company in employing the said Ed Johnson as engineer and in retaining him and allowing him to act as engineer at the time and place

in question." (Transcript, 3.) One of these charges of negligence was an act completed before the defendant in error was employed by the Railway Company. Either of the alleged acts would have given rise to a distinct cause of action involving a controversy wholly between citizens of different States. With neither of these alleged acts of negligence has the resident defendant the slightest concern, nor was it charged in the petition that he had. The controversy as to these alleged acts of negligence was wholly between citizens of different States, and the resident defendant could not, under any circumstances, have been interested therein.

A similar situation arose in *Adderson v. Southern Railway Co. et al.*, 177 Fed. Rep. 571 (C. C., N. D. Ga.), where a suit was brought against the railway company and the engineer and conductor of the train which struck and killed the husband of the plaintiff. The individual defendants were citizens of the same State as the plaintiff. The petition, after alleging several joint and concurrent acts of negligence of the railway company and the individual defendants, charged that the engineer was generally negligent in failing to sound the whistle at public crossings and stations, and ran his engine at a great and careless rate of speed; that he failed to signal the approach of

the engine in thickly populated communities where pedestrians used the track of the railway company, and failed to anticipate the presence of pedestrians on the track of the defendant in thickly populated communities, all of which was known to the defendant company, and that, therefore, "the defendant company was willfully and wantonly careless and negligent in allowing the said Perkins to operate the said engine by reason thereof." The charge that the railway company was guilty of negligence in knowingly employing an incompetent servant was made a ground of separable controversy in the petition for removal, as it was in the case at bar. In sustaining that contention, and in holding that for this reason the suit was properly removed to the United States Court, District Judge Newman held, following the Edwards case, *supra*, that it could not be true that an act of negligence in providing a careless and incompetent engineer was an act in which the latter participated or with which he was interested.

The charge in the petition that the Railway Company was alone responsible, among other reasons, for the injury to the defendant in error owing to the fact that the engine in question, being at the time engaged in interstate commerce, was, to the knowledge of the Railway Company, without proper, sufficient or safe

driving wheel brakes, and was old, worn, defective and unsafe, owing to which it would move without the intervention of human or outside agency, and that knowingly retaining and using said defective engine at the time in question was one of the direct and proximate causes of the accident, was a separable controversy wholly between the plaintiff and the Railway Company, with which the resident defendant was not and could not have been interested, and with which the Railway Company was not interested through or on account of the resident defendant. The situation is clearly illustrated by the decision of the Circuit Court of Appeals of the Sixth Circuit, in the recent case of *Nichols v. Chesapeake & O. Ry. Co.*, 195 Fed. Rep. 913, 915-916. Nichols, a citizen of the State of Kentucky, and a brakeman in the employ of the defendant railway company, brought an action in a court of that State against the railway company, a Virginia corporation, and Cook, a citizen of Kentucky. It was charged that Cook, the engineer in charge of the train with which the plaintiff was working when injured, was negligent and that through him the railway company was liable. It was also charged, by an amended petition, that the defendant railway company had violated the provisions of the Federal Safety Appliance Act and that the injury was due in part to such vio-

lation. In holding that this separate charge of negligence against the railway company was a separable controversy, entitling the railway company to a removal of the suit to the United States Court, Circuit Judge Denison said:

"By the amended petition of July, 1905, it appeared that a controversy existed whether the Railway Company was liable to Nichols by reason of the existence and effect of the Safety Appliance Act. This was a controversy with which Cook was not concerned. It was not alleged that he was liable, or that the Railway Company, through him, was liable, upon this subject-matter. At the same time the petition alleged a joint liability against the Company and Cook, resulting from Cook's common-law negligence as engineer in the management of the train. It has been distinctly held by the Supreme Court (*Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983) that the liability under a statute for failing to observe its provisions and the liability under the common-law rules of negligence may give rise to causes of action so separate that one may be barred by statute where the other would not be. It seems necessarily to follow that, where there are separate or distinct causes of action, there must be separable controversies. Each cause of action must present a controversy. Different rights of action may, it is true, often be joined in one suit, but this does not make them inseparable. The existence of the 'separable controversy' right of removal pre-supposes that it may be found joined in one action with another controversy. In the present case, even if the cause of action is not 'separate,' yet the 'separable' character of the claim under the statute is made clear by the fact that one of the defendants has no concern with this question. We are satisfied that the second removal petition conferred jurisdiction on the Federal

Court (*Jackson v. C., R. I. & P. Ry. Co.*, 178 Fed. 432, 102 C. C. A. 159), and that the action which had been commenced in March and was then pending in the state court upon the amended July petition was, for the first time, effectively removed."

These latter decisions, containing as they do an adjudication of questions identical with that now under discussion, leave little for further argument. With the question of the responsibility of the Railway Company for its alleged negligence in employing and retaining in its service an incompetent employe, and in furnishing a defective engine, in violation of the act of Congress, both of which, it is alleged, materially and directly contributed to the injury of the defendant in error, the resident defendant had no concern; for these respective acts of negligence the Railway Company could not be held liable through or by reason of the resident defendant. They were separate and distinct issues, by which separable controversies between the plaintiff and the Railway Company arose, and which entitled the Railway Company to have the suit removed to the United States Court. *Beuttel v. Chicago, M. & St. P. Ry. Co. et al.*, 26 Fed. Rep. 50; *Hartshorn v. Atchison, T. & S. F. R. Co. et al.*, 77 Fed. Rep. 9 (C. C., W. D. Mo.); *Elkins v. Howell, et al.*, 140 Fed. Rep. 157 (C. C., N. D. W. Va.); *McGuire v. Great Northern Ry. Co. et al.*, 153 Fed. Rep. 434

(C. C., N. D. Ia.); *Wheeling Creek Gas, Coal & Coke Co. v. Elder, et al.*, 170 Fed. Rep. 215 (C. C., N. D. W. Va.); *Willard v. Spartanburg, V. & C. R. Co. et al.*, 124 Fed. Rep. 796; *M'Allister v. Chesapeake & O. R. Co. et al.*, 198 Fed. Rep. 660.

In the case at bar evidence that the resident defendant was an incompetent employe would have been improper and clearly prejudicial in the alleged cause of action against the resident defendant himself; so far as he was concerned, the only question was whether he was negligent at the time of the accident. Likewise in the alleged cause of action against the resident defendant, evidence with respect to the condition of the engine would have been improper. The most that can be claimed for the petition in the case at bar is that a cause of action was stated against the resident defendant for his personal negligence, and another cause of action stated against the Railway Company for its failure to perform the primary duty it owed the plaintiff of using ordinary care to furnish him reasonably safe appliances and reasonably competent co-employes in the performance of his duties. At common law these two separate and distinct causes of action had absolutely nothing to do with each other. Each controversy not only could, but, of necessity, must be decided and complete relief afforded with-

out the presence of the other defendant. Judgment against the Railway Company would not necessarily mean judgment against the resident defendant. A judgment on one cause of action would not be a bar to a suit upon the other, except so far as the question of damages is concerned. If the resident defendant had seen fit to purchase his freedom from suit from the plaintiff, but not in satisfaction of the injury, it would not have barred an action against the Railway Company for its own alleged negligence. Evidence admissible under one cause of action would not only be immaterial but absolutely incompetent and prejudicial under the other; for instance, in the causes of action against the Railway Company on account of its own negligence, evidence of the competency of the resident defendant would be admissible under certain qualifications, as well as his general reputation for competency or incompetency under other conditions, yet in the cause of action against the resident defendant for his personal negligence on this particular occasion, such evidence would be incompetent, immaaterial and prejudicial in the extreme. *Southern Kans. Ry. Co. v. Robbins*, 43 Kan. 145, 148, 149, 23 Pac. Rep. 113; *Erb v. Popritz*, 59 Kan. 264, 269, 52 Pac. Rep. 871; *Telegraph Co. v. Vandervort*, 67 Kan. 269, 270, 72 Pac. Rep. 771.

In the cases before this Court in which it has been held that a separable controversy did not exist, the railway company or the master either jointly participated in the only act of which complaint was made, or was sought to be held liable, under the policy of the law, for specific acts of negligence of the resident defendants, as authorized by the practice of the State where the suit was commenced. In no one of these cases was there a separate charge of negligence against the master, separate from the alleged acts of negligence of its servants who were made defendants.

Even though the Railway Company and the resident defendant might be jointly liable for the consequences of the negligence of the resident defendant, under the Kansas Fellow Servant Act, nevertheless, under the other Kansas statute (heretofore set forth on page 6 of this brief) this joint cause of action could not be joined in the same suit with a cause of action against the Railway Company itself and with which the resident defendant was in no wise concerned. In *Leavenworth, N. & S. Ry. Co. v. Wilkins, et al.*, 45 Kan. 674, 26 Pac. Rep. 16, a cause of action for injuries to lands owned by one person by reason of an appropriation by the railway company was joined with an action for injuries to lands owned by the first person and another jointly. The Supreme Court of Kansas held that

the causes of action were improperly joined, as one of the causes of action affected one of the defendants only, saying:

"It cannot be said, then, that the second count affects all the parties to the action, and hence the code forbids their joinder in the same petition."

To the same effect is *Hoye et al. v. Raymond*, 25 Kan. 665.

In the case at bar, the charges of negligence against the Railway Company itself had no connection with the charge of negligence against the resident defendant, and there was no claim in the petition even that the alleged acts of negligence of the Railway Company were concurrent in either time or place with the act of negligence of the resident defendants. As completely as was possible, the charge of the respective acts of negligence against the Railway Company itself were separate and distinct from that against the resident defendant or against the Railway Company on account of the resident defendant. In no more positive way could a separable controversy between the plaintiff and the Railway Company have been stated, and it is respectfully submitted that the trial court and the Supreme Court of Kansas erroneously failed to recognize this separable controversy.

It is respectfully submitted that the District Court

of Seward County, Kansas, and the Supreme Court of the State of Kansas erred in denying the petition of the Chicago, Rock Island and Pacific Railway Company, asking that the suit be removed to the United States Court.

F. C. DILLARD,
PAUL E. WALKER,

Attorneys for Plaintiffs in Error.

APPENDIX.

In Order that the Questions Discussed in this Brief May Be More Conveniently Examined, a Detailed Discussion of the Decisions of this Court Construing the Separable Controversy Provisions of the Removal Act is Submitted as an Appendix.

In *Louisville & N. R. Co. v. Ide,* 114 U. S. 52, 56, an action was brought against several railway companies for the violation of several contracts which were alleged to be joint and binding on all of the defendants, jointly and in the same right. There was no claim of a separate cause of action in favor of plaintiff and against the removing defendant. "The claim of right to a removal is based entirely on the fact that . . . the petitioning defendant, has presented a separate defence to the joint action by filing a separate answer tendering separate issues for trial." This, of course, did not introduce a separate controversy within the meaning of the statute. The defendants had entered into certain contracts for the transportation of property. On the one side of the controversy, growing out of a failure to carry out the terms of the contracts, is the plaintiff, and on the other all of the defendants. It is apparent that such a controversy is not divisible.

In *Pirie, et al v. Tvedt, et al.,* 115 U. S. 41, 43, an action was commenced against the defendants to recover damages for a malicious prosecution, it being

alleged in the petition that the defendants confederating together, and with a malicious and criminal design to injure the plaintiffs, wrongfully, unlawfully and maliciously procured an action to be commenced against them, and maliciously conspired together to cause a writ of attachment to be issued upon the property of the plaintfifs. A non-resident defendant filed a petition for removal on the ground that the controversy between the plaintiff and it was separable. Upon such allegations, no claim that a separable controversy existed could have been made properly. In holding that a separable controversy did not exist, this Court said:

"There is here, according to the complaint, but a single cause of action, and that is the alleged malicious prosecution of the plaintiffs by all the defendants acting in concert. The cause of action is several as well as joint, and the plaintiffs might have sued each defendant separately, or all jointly."

The separate answers filed by the plaintiffs were immaterial, as a separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final determination in his own way. Mr. Justice HARLAN, with whom concurred Mr. Justice WOODS, dissented from this decision on the ground that the petition showed a separable cause of action, and in speaking generally of the test of separ-

ability under the statute, Mr. Justice HARLAN said:

"It seems to us that where the plaintiff, in a suit against several defendants in tort, is not required to prove a joint cause of action against all of them, but may have judgment as to those against whom he makes a case, there is, within the meaning of the act of Congress, a controversy in the suit, which is wholly between the plaintiff and each defendant, and finally determinable, as between them, without the presence of the other defendants as parties in the cause."

In *Sloane, et al v. Anderson*, 117 U. S. 275, an action was brought to recover damages by reason of the fact that the defendants took possession of the property of the plaintiffs and stopped their business for twenty-five days. In affirming the order remanding the suit, this Court said:

"In the present case there is, according to the complaint, but a single cause of action, and that is the wrongful seizure of the property of the plaintiff by the united efforts of all the defendants acting in common."

It being alleged that all of the defendants concurred in and acted jointly in the commission of the only offence of which complaint was made, it is manifest that the cause of action was joint or several at the option of the plaintiffs.

In *Stone v. South Carolina*, 117 U. S. 430, an action was brought by the State of South Carolina to recover a balance claimed to be due from Corbin & Stone, a co-partnership, for moneys collected by the firm for

the State and not paid over. One of the partners, a non-resident, petitioned for a removal on the ground of diversity of citizenship. This Court held that the statute did not authorize a removal of a suit between a State and citizens of another state on the grounds of diversity of citizenship, as a State cannot, in the nature of things, be a citizen of any State. No other ruling was possible under the terms of the statute. This Court also said that the cause of action was joint and that no separable controversy existed between the plaintiff and the removing defendant, saying:

"The money sued for was received by the defendants as partners, and they are liable jointly for its payment, if they are liable at all."

It is likewise apparent that, as to this feature of the case, no other decision could have been expected.

In *Plymouth Gold Mining Co. v. Amador Canal Co.*, 118 U. S. 264, 270, a suit was brought against the Mining Company and certain individuals to enjoin them from polluting the waters running into the canal of the plaintiff, and to recover damages for what had already been done in that way. It was alleged that the pollution had been caused by the acts of the defendants. In holding that the suit was not removable, this Court said:

"Upon the face of the complaint there is in the suit but a single cause of action, and that is the wrongful

pollution of the water of the plaintiff's canal by the united action of all the defendants working together. Such being the case, the controversy was not separable for the purpose of a removal, even though the defendants answered separately, setting up separate defences."

The complaint in this case charged that all of the defendants were jointly responsible for the pollution of the canal, and were, therefore, necessary and proper parties.

In *Little et al v. Giles, et al.*, 118 U. S. 596, a bill was filed to quiet the title of the complainants, charging that the defendants as co-conspirators were scheming to raise a cloud on the title of the complainants for the purpose of defrauding them of their property. Under such an allegation the Court held that the cause of action as stated in the bill was joint, as was, of course, apparent.

In *East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240, a suit was brought to set aside a lease for want of authority to make it, and the lessor and the lessee were made parties defendant. It is apparent, as this Court held, that both the lessor and the lessee are necessary parties, and that the cause of action against them, if any, was joint.

In *Torrence v. Shedd*, 144 U. S. 527, a suit was commenced by the complainant for the partition of a tract of land, to an undivided third of which, the complain-

ant claimed title. Subsequently a party was permitted to intervene and to file an answer and cross bill, admitting the deed to the plaintiff, but alleging that it was in trust for him, and claiming an equitable title in whatever should be set off to the plaintiff. It was claimed that by reason of the intervention a separable controversy was presented. In holding that a separable controversy within the meaning of the Removal Statute was not present, this Court held, that the object of the suit was not merely to establish the title of the plaintiff in an undivided share of the land, but was the partition of the whole land, and the conversion of his undivided share into an entire estate in a proportional part, as well as the establishment of his title against all of the defendants. The controversy between the plaintiff and the intervenor related only to the title claimed by the plaintiff in an undivided share, while the defendants as a class denied that either the plaintiff or the intervenor had any title whatever. It was apparent therefore, that no one of the parties could recover judgment setting off to him any share in the land, without establishing a title, not only as between the plaintiff and the intervenor, but also as against all of the other defendants. The controversy between the plaintiff and the intervenor was merely incidental to

the main object of the suit, and could not be determined as between them without the presence of the other defendants, and did not, therefore, constitute such a separate controversy as would justify a removal to the United States Court.

The decisions in the foregoing cases seem to follow as a matter of course; because in each one the cause of action set forth in the petition was joint, and all of the defendants were necessary parties to the determination of the only question before the Court. Under such circumstances the controversy between the plaintiff and one of the defendants could not be separable.

The case of *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, is not in point. That was an action brought in the State of Illinois by a citizen of that State against two railroad companies, one a corporation of Illinois, and the other a corporation of Kentucky, for their joint and concurrent negligence in breaking and entering her close and tearing up and carrying away a railroad switch. There was no allegation of fraud with respect to the joinder of the Illinois corporation. This court simply held that a joint action being brought by the plaintiff, a separable controversy did not exist between the plaintiff and the foreign corporation. It was apparent from the allegations of the petition that the cause of action was joint or several at the option of

the plaintiff, and there could not, of necessity, be a separable controversy.

In *Whitcomb v. Smithson*, 175 U. S. 635, an action was commenced by a citizen of Minnesota in a court of that state against the Chicago Great Western Railway Company and Whitcomb and Morris, Receivers of the Wisconsin Central Company, to recover for personal injuries received while acting as a locomotive fireman for the Chicago, Great Western Company in a collision between the locomotive on which he was at work and another locomotive operated by Whitcomb and Morris, as receivers. The receivers asked for a removal on the ground that the controversy between the plaintiff and them was separable, and while that question was not the one principally before this Court, yet it is apparent that the charge in the petition showed as a matter of fact that the defendants were jointly liable, and that, therefore, the plaintiff had a right to sue them jointly if he choose.

In the case of *Chicago, R. I. & P. Ry. Co. v. Martin*, 178 U. S. 245, 248, is similar. In that case suit was brought by a citizen of Kansas in a court of that state against a foreign corporation and the receivers of another railroad corporation who were citizens of Kansas, to recover damages for the alleged joint negligence of the defendants, resulting in a collision between two

trains of the respective parties. The question before this court was not whether there was a separable controversy between the receivers and the plaintiff; in fact the removal was applied for by the receivers solely on the ground that the suit arose under the constitution and laws of the United States, no claim being made that there was a separable controversy. It is apparent, also, from the allegations that the cause of action was joint and that there was no separable controversy.

All that was decided in the case of *Powers vs. Chesapeake & O. Ry. Co.*, 169 U. S. 92, was that, if after the time prescribed by statute or rule of court of the State for answering the petition had elapsed, nevertheless a suit in which a joint cause of action was alleged against several defendants, a part of whom are residents and citizens of the same state as the plaintiff, may be removed whenever the action is discontinued, at the request of the plaintiff, as to the resident defendants. In discussing the situation Mr. Justice Gray stated that it was well settled that an action of tort which might have been brought against many persons, or any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants to the Federal Court. This rule is, of course, fundamental. But with respect to whether

a master and servant could be joined in an action for a tort under circumstances existing in this case, it was said that it was unnecessary to consider which of the views was the correct one, as the Circuit Court by remanding the case finally adjudged as between the parties and for the purposes of this case, that the case was not removable, and that order was not reviewable.

The case of *Chesapeake & O. Ry. Co. v. Dixon*, 179 U. S. 131, 135, to which reference is so frequently made in cases involving the removal of actions from State to Federal Courts, in no particular sustains the contention that the petition for removal in the case at bar was properly denied. In that case, suit was brought by a citizen of Kentucky in a court of that State against a railway company organized under the laws of the State of Virginia and two of its employes who were citizens of Kentucky, to recover damages by reason of the death of plaintiff's intestate, alleged to have been caused by the negligence of the two resident employes in the management of a train of the railway company.

By Section 241 of the Constitution of Kentucky it is provided that,

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then,

in every such case, damages may be recovered for such death, from the corporations and persons so causing the same."

And by Section 6 of the Kentucky statutes it is provided that,

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is wilful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representatives of the deceased."

In view of this situation, the Court of Appeals of Kentucky held that the cause of action was joint and that there was no separable controversy between the plaintiff and the defendant railway company which entitled the latter to remove the case to the Federal Court. In speaking of this situation, Mr. Chief Justice FULLER said:

"The cause of action thus created is independent of any right of action the deceased may have had, or would have had if he had survived the injury; and in this case the Court of Appeals held that the company and its engineer and fireman were jointly liable for Dixon's death, if caused by the negligence of those employes; and that the cause of action as alleged against all the defendants was an entire cause of action."

It would seem to follow as a matter of course, that

since the defendants were made jointly and severally liable by the constitution and statutes of Kentucky, a constitution and statutes in a single action. One of the plaintiff might sue all parties made liable under the parties thus made jointly liable would have no right to say that a cause of action should be separable, which the specific terms of the constitution and the statutes made joint.

For the same reason the case of *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Bohon,* 200 U. S. 221, 225-226, is not controlling. In that case the petition charged that the plaintiff's intestate while employed as a brakeman and switchman was killed by the negligence of the defendant railway company and its engineer. The action was brought by a citizen of Kentucky in a court of that State against a foreign railway corporation and its engineer who was likewise a citizen of Kentucky. The railway company asked for a removal of the case to the Federal Court upon the sole ground that there was a separable controversy between it and the plaintiff. The court below held that under the express provisions of the constitution and statutes of Kentucky, hereinbefore set forth, the cause of action was joint, and refused to remove the case to the Federal Court. In affirming this ruling, Mr. Justice DAY, speaking for this Court, called atten-

tion to the specific provisions of the Kentucky constitution and statutes, and noted that the State courts of Kentucky had held, in construing these provisions, that the cause of action thereunder was joint., *Winston's Administrator v. Illinois Central R. Co. et al.*, 111 Ky. 954; 65 S. W. Rep. 13, and it was held that since the action was properly joint in the forum in which it was being prosecuted, it could not be removed as a separable controversy under the Act of Congress, the Court saying:

"We have under consideration an action for tort which by the constitution and laws of the State, as interpreted by the highest court in the State, gives a joint remedy against master and servant to recover for negligent injuries. . . A State has an unquestionable right by its constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff in due course of law and in good faith has filed a petition electing to sue for a joint recovery given by the laws of the State, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a non-resident defendant therein properly joined in the action under the constitution and laws of the State wherein it is conducting its operations and is duly served with process."

In these cases, there being direct and specific authority for the joinder of the defendants under the constitution and laws of Kentucky, a defendant had no right

to say that the cause of action which had been made joint by statute, should be separable.

In *Southern Railway Co. v. Carson,* 194 U. S. 136, an action was brought by an employe against the railroad company and two resident defendants, both employes, it being charged that the injury to the plaintiff was due to the joint and concurrent carelessness, negligence, and recklessness of the defendants, and to their joint and concurrent recklessness, carelessness, willfulness and wanton disregard of the plaintiff's right and safety. *The non-resident defendant did not file a petition for removal.* In discussing the case, Mr. Chief Justice Fuller took occasion to say, however, that the action would not have been removable under the rule laid down in the case of *Powers v. Chesapeake & O. Ry. Co., supra,* and *Chesapeake & O. Ry. Co. v. Dixon, supra,* saying that under the law of South Carolina, where the suit was brought, the identification of master and servant was so complete that the liability of both might be enforced in the same action. By an act of 1898, incorporated in the South Carolina Code of Civil Procedure as Sec. 186 a, the statutes of that State expressly authorized the joinder. *Schumfert v. Southern Ry. Co., et al.,* 65 S. C. 332, 43 S. E. Rep. 813. The right of removal was not involved in this case, as no request was made therefor, and the statutes

of the State where the suit was begun, expressly authorized the joinder in giving the right of action, for both of which reasons the case was inapplicable to the situation now under discussion.

Neither does the case of *Illinois Central R. Co. v. Sheegog's Administrator*, 215 U. S. 308, 316, 318, conflict with the position of the plaintiffs in error. As appears from the decision of the Court of Appeals of Kentucky, *Illinois Central R. Co. v. Sheegog's Administrator*, 126 Ky. 252, 103 S. W. Rep. 323, the action was instituted by the administrator of Sheegog, who was killed in a derailment of an engine on which he was engineer. The Chicago, St. Louis & New Orleans Railroad Company, the owner and lessor of the road; the Illinois Central Railroad Company, the lessee of the road, and the conductor in charge of the train, Durbin, were all made defendants to the action. The plaintiff was a citizen of Kentucky, as was the defendant Durbin. The Chicago, St. Louis & New Orleans Railroad Company was a Kentucky corporation, and the Illinois Central Railroad Company was organized under the laws of the State of Illinois. Among other things, it was alleged that the two defendant railroad companies were negligent, in that the lessor negligently maintained the railroad, and that the lessee company was negligent in permitting the road to be

operated while in such defective and dangerous condition. The charge was that through the negligence of both defendant railroad companies the roadbed, track, etc., were in an improper condition, and that through the negligence of the lessee company the engine and cars were in an improper condition, and that the death was due to all of these causes acting jointly. There was also a charge that the conductor was negligent in ordering and directing the management of the train. The defendant Illinois Central Railroad Company filed its petition and bond for removal, alleging only that a separable controversy existed between it and the plaintiff, determinable between them without the presence of either of the co-defendants. *It was conceded that the petition of the plaintiff, stated a joint cause of action against the defendants.* The State court refused to order the removal, and the Court of Appeals of Kentucky upheld the ruling on the ground that since it was conceded that a joint cause of action was alleged in the petition against the defendants, the controversy was not separable, as the distinction between different forms of action had been abolished by the Kentucky Code of Practice, and that all persons, under the rule in Kentucky, who were liable for a wrong might be sued jointly in that state in a single action. Since it was conceded that the petition stated

a joint cause of action, and since by the express terms of the constitution and statute of Kentucky such defendants were made jointly liable, it followed as a matter of course that, on the face of the petition, the cause was not removable, and, as an additional ground for refusing to order the removal, the State court called attention to Section 203 of the Kentucky Constitution, which is in these words:

"No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges."

The court in construing this section of the constitution, and following the earlier case of *McCabe's Administratrix v. Maysville & Big Sandy Railroad Co.*, 112 Ky. 861, 66 S. W. Rep. 1054, held that no lease made by a railroad corporation could exempt it from liability for the wrongs of its lessee. The granting of the franchise by the State was upon the condition that the railroad company receiving the franchise must pay damages to any person injured by any want of care in using the right so granted, and that the responsibility of the lessor extends to the employes of the lessee, when, as here, the injury results from the negligent omission by the lessor of some duty owed to the public,

such as the proper construction or maintenance of the railroad. The presence of the resident employe as a defendant was not considered by the State court. In affirming the ruling of the Kentucky Court of Appeals, Mr. Justice HOLMES said:

"In the case of a tort which gives rise to a joint and several liability the plaintiff has an absolute right to elect, and to sue the tort-feasors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face. *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Bohon*, 200 U. S. 221. If the legal effect of the declaration in this case is that the Illinois Central Railroad Company was guilty of certain acts and omissions by reason of which a joint liability was imposed upon it and its lessor, the joinder could not be fraudulent in a legal sense on any ground except that the charge against the alleged immediate wrongdoer, the Illinois Central Railroad itself, was fraudulent and false."

It must follow, of course, that where the constitution and laws of a state authorize a joint action against several defendants, a plaintiff has a legal right, in the absence of fraud, to sue any one or all of such persons. The question of joinder in this particular case was solely a question of whether or not the Kentucky statutes and decisions made the particular defendants jointly liable, and, as this Court said, the Kentucky

Court of Appeals appears to have thus decided it, and it was upon that theory only that the case was held to be not removable by this Court, as is clearly shown by the following statement from the opinion:

"So that, whatever may be the precise line drawn by that court hereafter, it stands decided that in Kentucky the facts alleged and proved against the Illinois Central Railroad in this case made its lessor jointly liable as matter of law. This decision we are bound to respect.

It follows, if our interpretation of the decision is correct, that no allegations were necessary concerning the Chicago, St. Louis and New Orleans Railroad Company, except that it owned and had let the road to its co-defendant. The joint liability arising from the fault of the Illinois Central Road gave the plaintiff an absolute option to sue both if he preferred, and no motive could make his choice a fraud."

In speaking of the question involved in the Sheegog case, District Judge Cochran in the recent case of *M'Allister v. Chesapeake & O. R. Co. et al.*, 198 Fed. Rep. 660, 664 (C. C., E. D. Ky.), said:

"In brief, the point of decision in the Sheegog case was that the death of plaintiff's intestate was caused by the lessor's own wrongful act, and the lessor was not held liable for the wrongful act of the lessee."

In the discussion of this case, it must not be lost sight of that under the constitution and statute of Kentucky permitting recovery for death, a railway company and its negligent employe were made jointly liable.

The same situation arose in the recent case of *Chicago, Burlington & Quincy Ry. Co. v. Willard*, 220 U. S. 413, 424-425. In that case a citizen of Illinois brought an action against a railroad company which was organized under the laws of Illinois, as owner of the road, and against a railway company organized under the laws of the state of Iowa, as lessee of and operating the road, upon which the intestate of the plaintiff was killed. It appeared that, under the statutes and decisions of the state of Illinois, a lessor railroad company is required to answer for the consequences of the negligence of the lessee company in the operation of the road, and that the statutory permission to lease a railroad does not relieve the lessor from the obligations cast upon it by its charter, and that a joint action may be brought against the lessor company and the lessee company to recover damages for the negligent operation of the road. *Balsley v. St. Louis, A. & T. H. R. Co.*, 119 Ill. 68, 8 N. E. Rep. 859; *Pennsylvania Co. v. Ellet*, 132 Ill. 654, 24 N. E. Rep. 559; *Chicago & Erie R. Co. v. Meech*, 163 Ill. 305, 45 N. E. Rep. 290; *Chicago & Grand Trunk Ry. Co. v. Hart*, 209 Ill. 414, 70 N. E. Rep. 654; *Chicago & W. I. R. Co. v. Newell*, 212 Ill. 332, 72 N. E. Rep. 416. In view of these decisions, Mr. Justice HARLAN said:

"It is thus made clear that if the plaintiff had any

cause of action on account of the injury in question he could bring a joint action in an Illinois court against the lessor and lessee companies. Whatever liability was incurred on account of the death of the plaintiff's intestate could, at the plaintiff's election, be asserted against both companies in one joint action, or, at his election, against either of them in a separate action."

This conclusion followed as a matter of course, as the statutes and decisions of Illinois made the cause of action joint and gave the plaintiff the right to sue both defendants jointly, if he desired.

If, under the State law, the lessor had not been liable to the plaintiff in the Sheegog and Willard cases, both suits would have been removable to the United States Court. Thus in *Williard v. Spartanburg, U. & C. R. Co. et al.*, 124 Fed. Rep. 796 (C. C., S. C.), Circuit Judge Simonton held that an action by an employe of a railroad company operating a railroad under a lease, against such company and its lessor, to recover for a personal injury alleged to have been due to the negligence of another employe of the same employer, presents a separable controversy between the plaintiff and the lessee company, and that the suit was removable, where the lessee is a foreign corporation. In this case the lessor, the resident defendant, was held not liable under the allegations of the petition as the injury was not due to the violation of a duty which the lessor company owed to the plaintiff, as one of the general public.

And in *M'Allister v. Chesapeake & O. R. Co. et al.*, 198 Fed. Rep. 660, (D. C., E. D. Ky.), the Sheegog case is clearly distinguished, even under the Kentucky rule. In that case an action was brought in a state court of Kentucky, by a citizen of that State, against a non-resident lessee railroad company and its resident lessor, to recover for the death of the plaintiff's intestate, who was struck and killed by a train operated by the lessee company. The court held, as a matter of law, that the petition showed that the death of the plaintiff's intestate was not caused by the violation on the part of the non-resident defendant, the lessor, of a public duty, that is, of a duty owed to the public generally, and that, therefore, no cause of action was stated against the lessor, the resident defendant. For this reason it was held that the controversy between the plaintiff and the non-resident defendant, the lessee, was separable and the case properly removable to the United States Court.

In the consideration of the Powers, Dixon, Bohon and Sheegog cases, *supra*, it must be borne in mind that while, as has been pointed out, by the settled law in Kentucky, in which State all of these cases were commenced, in accordance with the constitution, the statutes and the recognized practice, servants whose negligent acts create the liability of a master, may be sued

jointly with the master (*Enos v. Kentucky Distilleries & Warehouse Co. et al.*, 189 Fed. Rep. 342, 346; 6th C. C. A.), yet the allegations of negligence with respect to such employes, the resident defendants, must be specific and must show a cause of action against them or the non-resident defendant may remove the suit to the Federal Court. *Cincinnati, N. O. & T. P. Ry. Co., v. Robertson*, 115 Ky. 858, 74 S. W. Rep. 1061; *Davis, Administrator v. Chesapeake & O. Ry. Co. et al.*, 116 Ky. 144, 75 S. W. Rep. 275; *Slaughter v. Nashville, C. & St. L. Ry. Co. et al.*, (Ky.), 91 S. W. Rep. 744. It is not sufficient that residents be joined as defendants and generally charged with responsibility; the petition, in order to defeat a removal, must show a real and substantial cause of action against the resident defendants and one recognized by the laws of that State.

In the discussion of the Kentucky cases, it is also well to bear in mind that the distinction between acts of misfeasance and those of nonfeasance is not recognized in that State. *Murray, et al. v. Cowherd*, (Ky.); 147 S. W. Rep. 6.

The case of *Southern Railway Co. v. Miller*, 217 U. S. 209, 216, is not an authority sustaining the proposition that, under all circumstances, a master and servant may be jointly sued for the negligent act of the servant. In that case a suit was brought against a rail-

way company, organized under the laws of the state of Virginia, and three of its employes who were citizens and residents of Georgia, by a plaintiff who was likewise a citizen and resident of Georgia. The plaintiff, an engineer in the employ of the defendant railway company, was injured in a collision between his train and another train of the railway company in charge of the three resident defendants, as engineer, conductor and brakeman, thereof, it being alleged that the three resident defendants were responsible for the collision by their joint and concurrent acts of misfeasance. The railway company filed a petition for removal to the Federal Court, upon the ground that the controversy between it and the plaintiff was separable. The Court of Appeals of Georgia, *Southern Ry. Co. et al. v. Miller*, 1 Ga. App. 616; 57 S. E. Rep. 1090, held that the petition for removal was properly denied; first, on the ground that the acts of negligence alleged against the resident defendants were acts of misfeasance, for if the acts of negligence alleged had been acts of omission or nonfeasance, a joint cause of action could not have been stated under the law of Georgia, *Southern Ry. Co. v. Grizzle*, 124 Ga. 735, 53 S. E. Rep. 244, 245; second, on the ground that under the statutes and decisions of Georgia, a joint cause of action could be brought against a master and servant for the negli-

gence of the servant. The decision was based, in this particular, upon the holding of the Supreme Court of Georgia in *Southern Ry. Co. v. Grizzle, supra,* which, in turn, was based upon the decision of the Supreme Court of Georgia in *Central of Georgia Railway Co. v. Brown,* 113 Ga. 414; 38 S. E. Rep. 989, in which it was held that owing to the abolition of the distinction between various causes of action by the Georgia Code, actions in trespass and trespass on the case could be joined in the same action, and that, therefore, a master and servant could be jointly sued for the negligence of the servant. In the Miller case, the court took occasion to call attention to the statutes of Georgia necessarily involved. By Section 2782 of the Georgia Code, every railroad company doing business in that state is held liable to an employe for "injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." By Section 115 of the Georgia Penal Code it is provided that:

"If any person employed in any capacity, by any railroad company doing business in this State, shall, in the course of such employment, be guilty of negligence, either by omission of duty or by any act of

commission, in relation to the matters intrusted to him, or about which he is employed, from which negligence serious bodily injury, but not death, occurs to another, he shall be guilty of criminal negligence, and shall be punished by confinement in the penitentiary not less than one nor more than two years, in the discretion of the court."

And, as the court said in the Miller case, "certainly an act which is thus made criminal is actionable in a civil suit, if injury results from such act." It thus appears that the defendant railway company was made liable by statute for the injury suffered by the plaintiff, and the resident defendants were likewise made liable by the statute to the plaintiff for the same injuries. The plaintiff claimed that his injuries were due to the joint negligence of the defendants, and the Code of Georgia authorized him to bring a joint cause of action against them. Under such circumstances, it is apparent that there was not a separable controversy between the defendant railway company and the plaintiff. In speaking of this situation, Mr. Justice Day said:

"The petition for removal contained no charge that the attempt to join the defendants was for the purpose of fraudulently avoiding the jurisdiction of the United States Court, or with a view to defeat a removal thereto. The case here presented is one in which the record discloses there was an attempt to join, in good faith, the railway company and the individual defendants as for a joint liability in tort."

And it was held by this Court that since the joinder was authorized by the laws of Georgia, and since the plaintiff had charged that the defendants were jointly and concurrently liable for his injuries, the action must be deemed to be such as the plaintiff had made it, in good faith, in his pleadings.

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In the Supreme Court

of the United States.

OCTOBER TERM, 1912

No. 208

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND EDWARD JOHNSON,

Plaintiffs in Error,

vs.

ALBERT M. DOWELL,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Supplemental Brief for Plaintiffs in Error

F. C. DILLARD,
PAUL E. WALKER,
For Plaintiffs in Error.

J. D. HOUSTON,
E. C. HYDE,
F. S. MACY,
For Defendant in Error.

CRANE & CO., TOPEKA.

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WHILE it is respectfully maintained that the several causes of action against the Railway Company could not have been joined properly with the cause of action against the resident defendant under the express

terms of the Kansas statutes, as was attempted to be shown by the first and second section of the original brief for the plaintiffs in error, at pages five and fourteen thereof; and while the fraudulent joinder of the resident defendant is conclusively shown at page thirty-four of our original brief, yet, in view of the opinion of this Court in *The Chicago, Rock Island and Pacific Railway Company et al. v. Schwyhart et al.*, decided this term, the plaintiffs in error respectfully desire to call attention to the clear distinction between that case and the one at bar. If it be conceded that the joinder of the resident defendant was not fraudulent, but in good faith, and that the alleged negligence of the resident defendant was joint and concurrent with that of the Railway Company, as alleged in the petition, so that the defendant in error was justified in bringing a joint cause of action against the plaintiffs in error, *yet the two additional causes of action set forth in the petition as grounds for recovery against the Railway Company alone, and with wihch the resident defendant had nothing to do, and with which it was not claimed that he was connected, and for which a recovery was not asked against him, raised controversies which must of necessity have been separable.* The statute regulating the removal of causes specifically recognizes that in any suit such a contingency may arise and that,

under such circumstances, a defendant, between whom and the plaintiff there is the requisite diversity of citizenship, may remove the controversy with which the other defendant is not concerned. Upon this question, the decision in the Schwyhart case is not controlling, because it does not deal with this phase of the removal question. In the absence of oral argument, therefore, the plaintiffs in error desire to call particular attention to that part of their original brief, beginning on page forty thereof, wherein this phase of the case at bar is discussed.

F. C. DILLARD,

PAUL E. WALKER,

Attorneys for Plaintiffs in Error.

SUBJECT INDEX.

The question herein involved is, did the trial court commit error in refusing to remove the case to the Federal Court, on the petition of the Railway Company.

The petition for removal filed by defendants below alleged substantially, as grounds for removal:—

1. That no cause of action was stated against Johnson, the individual defendant.

2. That there was no joint liability in this case and that therefore the defendants could not be joined in the action.

3. That Johnson was financially irresponsible, and that he was made codefendant with the sole and fraudulent purpose of preventing removal of the case to the Federal Court.

4. That there is a separable controversy between plaintiff below, and the Railway Company, which required a removal of the cause on the petition of said Railway Company. (R. 5-8).

5th. That the petition for removal herein was wholly insufficient as to the charge of fraudulent joinder as held by the Kansas Supreme Court and also in like cases in Federal Court. It is a statement of conclusions and not of specific facts constituting the fraud:.....25, 36

6th. That the charge that Engineer Johnson was financially irresponsible and was joined as defendant merely to prevent removal of the case to the Federal Court, even if true, is no evidence of fraudulent joinder, if plaintiff in good faith thought he had a right to join him as defendant: 30

7th. That as to whether there is a controversy warranting a removal to the circuit court must be determined by the state of the pleadings and the record of the case at the time of filing the application for removal:.....32

In The Supreme Court
of the United States

October Term, 1912
No. 208

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND EDWARD JOHNSON, PLAINTIFFS IN ERROR,

vs.

ALBERT M. DOWELL, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

In his complaint filed in the District Court of Seward County, Kansas, on February 15th, 1908, the plaintiff charges that while he was working for the defendant railway company engaged in removing cinders from its track in the

town of Liberal, Kansas, defendant's engineer, Ed Johnson, without warning to this plaintiff, and without any signal and without ringing the bell or blowing the whistle of said engine backed the engine over this plaintiff, crushing both plaintiff's legs so that it became necessary to amputate his right leg above the knee and his left leg below the knee, rendering plaintiff a hopeless cripple for life. It is also charged that the engine was defective and unsafe; and in the fourth paragraph plaintiff further charged,

"That the injury to plaintiff was the direct and proximate result of the unfitness and incompetency of the defendant, Ed Johnson, and of the negligence and caselessness of said Ed Johnson in carelessly, recklessly and needlessly running said engine upon and against the said plaintiff, and of the careless failure of the said Ed Johnson in neglecting to use proper precaution to observe and avoid running upon and injuring the said plaintiff at the time and place in question, and in the carelessness of the defendant railway company in employing the said Ed Johnson as engineer at the time and place in question, and in the carelessness of the defendant railway company in knowingly retaining and using said defective engine at said time and place, and in carelessly failing to take proper precaution to prevent injury to said plaintiff at said time and place while engaged in the discharge of his duty as employee of said defendant railway company; that each and every act of omission and commission of the defendants and

of each of them as above, were the joint, proximate and concurrent causes of said injury, and each of said acts of the said defendants materially contributed to the injuries of said plaintiff." (R. 3).

The defendant railway company and Ed Johnson filed their bond and petition for removal of the cause to the Federal Court. (R. 5-7).

The Court denied the application to remove.

Thereafter each defendant filed a general denial and a plea of contributory negligence, etc., as a defense.

On the trial the jury returned a verdict against both defendants for $15,000.00. The case was taken to the Supreme Court of Kansas by defendants, and there affirmed by that Court, as against both defendants.

The defendants now seek to have this court reverse the state court of Kansas on the ground that the petition for removal from the state to the Federal Court was improperly denied, and the case is here for review solely on that ruling of the State Court.

AUTHORITIES.

Before discussing the grounds for removal we refer to the following propositions:—

Federal Courts will not take cognizance where the record does not affirmatively show jurisdiction to be in those courts, and the presumption at every stage of the case is that it is without their jurisdiction unless the contrary appears from the record: Bors. vs. Preston, 111 U. S. 253, (28 L. Ed. 420); Mansfield Railroad Company vs. Swan, 111 U. S. 383, (28 L. Ed. 464); Carson vs. Hyatt, 118 U. S. 279, (30 L Ed. 167); Crehore vs. O. M. R. R. 131 U. S. 240, (33 L. Ed. 144); Madisonville Traction Co. vs. St. Benard Mining Co. 196 U. S. 239, (49 L. Ed. 462); N. O. & T. Ry. vs. Bohon, 200 U. S. 221-225-6.

"We fully recognize the principle heretofore asserted in many cases that the state court is not required to let go its jurisdiction until a case is made which upon its face shows that the petitioner can remove the cause as a matter of right."

R. R. vs. Meyer, 100 U. S. 457, 474.

Schwyhart vs. Barrett, 130 S. W. 388, 145 Mo. App. 332.

A GOOD CAUSE OF ACTION IS STATED AGAINT BOTH THE RAILWAY COMPANY AND DEFENDANT JOHNSON.

Independent of any statute creating special liability Johnson is liable to plaintiff, under the

facts charged, and a good cause of action is stated against him in the petition. He is charged as jointly liable with the railway company for a tort committed by him while in the performance of his duty as engineer. The general rule is as announced in 33 CYC, 728, paragraph 11, where the author says:

"While some of the cases make a distinction between acts of misfeasance and nonfeasance, it is ordinarily held that an employe of a railroad company by whose negligent act an injury is inflicted is personally liable therefor and cannot escape liability upon the ground that he was acting merely as agent for another." (Citations).

Also Riser vs. Southern Ry. 116 Fed. 215, and authorities therein cited.

Also Charman vs. Lake Erie & Western R. R. 105 Fed. 449, and cases therein cited.

Also Railroad vs. Thompson, 200 U. S. 206; Southern Ry. vs. Miller, 217 U. S. 209, and Dowell vs. Ry. 83 Kans., 562 Syc. 1.

Yet opposing counsel seem to contend that the employe is never liable for his acts as employe, unless made so by some statute.

Nearly all the decisions, however, uphold the general law as quoted above from CYC, and this, too, without reference to the question as to whether or not some state statute also makes the employe liable in such cases. The only division of opinion in the cases, is on the question as to whether any liability of the servant exists, when the act of the servant is merely an act of **non-feasance**; and in such case some authorities hold that the servant himself is not liable to the third party receiving injuries as the result of his mere non-performance of duty, or non-feasance. But, that question is immaterial in the case at bar, since the plaintiff below charges acts of misfeasance as well as of non-feasance against the defendant, Johnson, and states, among other things, that he negligently managed his engine in question and negligently and needlessly and recklessly ran over and injured the plaintiff. In other words, plaintiff charges him as improperly doing his work in a negligent manner.

From the definition, of the term "**Misfeasance**" given in **Volume 5 of Words and Phrases,** page 4535, the acts charged against the engineer in plaintiff's petition were clearly acts of misfeasance. Some definitions there given are as follows:

"Misfeasance is the improper doing of an act which a person might lawfully do."

Again,

"Misfeasance is default in not doing a lawful act in a proper manner, or omitting to do it as it should be done."

Again,

"Misfeasance may involve to some extent the idea of not doing, as where an agent while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances, as for instance, when he does not exercise that care which a due regard to the rights of others may require."

The last definition above is in accordance with the views of the Supreme Court of Kansas given in the opinion rendered by it in the case at bar.

C. R. I. & P. Ry. Co. vs. Dowell, 83 Kan., 562; also
Morris vs. Ry. 175 Fed. 491;
Cooley on Torts, Second Edition (1888), page 164;
Davenport vs. So. Ry. 135 Fed. (C. C. A.) 960, 962.

This question is fully discussed and authorities collected in case notes to Haggerty vs. Wilson, et al, 25 L. R. A. (N. S.) 356.

Johnson would be liable at least for the

negligence charged against him in the fourth paragraph of the complaint, wherein it is charged that he "Carelessly, recklessly and needlessly ran said engine upon and against the said plaintiff," etc.

This charge is not merely of an omission of duty to plaintiff, but of actively doing a wrong to plaintiff, and therefore is a charge of misfeasance. See also Meachan on Agency, 572; First A. & E. Encyl. of Law, 1132; 31 CYC, 1559.

DEFENDANTS ARE PROPERLY JOINED.

The Supreme Court of Kansas has determined in this case (83 Kan. 562), that Johnson was liable herein jointly with the railway company, as he caused the injury by acts of misfeasance and nonfeasance in the discharge of his duty as engineer. This is conclusive on this Court, as held in Southern Ry. vs. Miller, 217 U. S. 209, where the opinion of the Court of Appeals of Georgia was followed and its decision quoted as follows:

"In an opinion by the Chief Judge it was held that the acts of negligence charged against the individual defendants, involved both acts of omission and commission, and were not merely matters of non-feasance for which the agents would not be jointly liable with the principal. * * * * In view of the conclusion, which

the learned court reached it further held that the case was ruled by Alabama G. S. Ry. vs. Thompson, 200 U. S. 206. We agree with that conclusion. In that case it was held that for the purpose of determining the removability of a cause, the case must be deemed to be such as the plaintiff has made it in good faith in his pleadings."

In the older cases before the code abolished distinctions between actions on the case and in trespass, etc., this distinction is likewise observed between acts of misfeasance and of nonfeasance on the part of the servant. Now, these distinctions are abolished in Kansas by section 5603, General Statutes of 1909, which reads:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished and in their place there shall be hereafter but one form of action, which shall be called a civil action."

Section 5628, General Statutes of Kansas, 1909, provides that:

"Any person may be made a defendant * * * who is a necessary party to a complete determination or settlement of the question involved therein." And see

L. N. R. R. vs. Ide, 114 U. S. 63.

The Supreme Court of Kansas has decided in Luengene vs. Consumers Light & Power Co.,

86 Kan. 866, page 876, as follows:

"The city might be responsible for the broken main and the Gas Company for the defective service pipes, and if these causes operating together caused the explosion, the negligence of one would not excuse the other. Where two or more parties by their concurrent wrong-doing cause injury to a third person they are jointly and severally liable. Kansas City vs. Slangstron, 53 Kan. 431, Syl. 2; Kansas City vs. File, 60 Kan. 157; Arnold vs. Milling Co., 86 Kan. 12; McKenna vs. Gas Co., 47 Atl. 990, S. C. 198, Pa. State, 31; Louisville vs. Schneider, 143 Ky. 171; 136 S. W. 212, 35 L. R. A. 356 Note, 32 L. R. A. New Series, 809, note; First Thompson Commentaries on the Law of Negligence 75."

In Arnold vs. Hoffman, etc., 86 Kan. 12, where several parties were sued for obstructing a water course, one of them by "throwing car loads of stone in the river and the other defendant by building a dam near the same place at a height not allowed by law," the trial court required plaintiff to separately state his causes of action, but the Supreme Court, on page 13 of the opinion, say there is no misjoinder and that:

"The ruling requiring plaintiff to separately state and number the causes of action were not warranted and cannot be affirmed. If two or more parties acting jointly wrong and injure another they are jointly and severally liable for the consequences and the injured party may at his option sue one or all of those contributing

to the injury. Kansas City vs. File, 60 Kan. 157, etc."

In Kansas City vs. File, 60 Kan. 157, where a suit was brought against the City and the Electric Company for injuries caused by an electric wire allowed to remain in the street, the court holds both liable under one action and says:

"Each defendant was under obligation to see that the electric wire did not fall down and remain upon the ground—the city because of the general oversight of its street which the law requires it to take and the light company because of its obligation to prevent its property from becoming a dangerous menace to the public safety. If it be admitted that these obligations are different or spring from different sources, they nevertheless concur to one end—to the end of avoiding many other and similar consequences, just such injuries as the plaintiff sustained. The concurring neglect of these respective obligations produced a single consequence and must therefore be viewed as joint and mutual."

In the various cases above the Kansas Supreme Court have held the respective defendants jointly liable; and even where each of the various obligations of the different defendants were different or "sprung from different sources yet concurred to one end," the causes of action, (if more than one), affected all the parties defendant to the action and could be joined.

There is, in fact, but one cause of action in the case at bar, to-wit: Wrongfully running the car over plaintiff. The cause of action is single and indivisible, as there was but a single injury. But whether there are two or more causes, is also immaterial. It is said in 38 CYC, page 488, that:

"Where, although concert is lacking, the separate and independent acts of negligence of several combined to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it."

Many authorities from the various states are cited to uphold the text, including Kansas City vs. Slangstrom, 53 Kan. 431; Osage City vs. Larkin, 40 Kan. 206. See also C. R. I. & Pac. vs. Durand, 65 Kan. 380, where it is held that a hack driver could be held jointly liable with the railway company where each was negligent and causing a collision between the railway train and the hack. And in Kansas City vs. File, 60 Kan. 157, where both the City and the Electric Light Company were held liable for an injury caused by a broken wire remaining in the street. See also Ry. vs. Beebe, 39 Kan. 465.

So, in the case at bar, the Kansas Supreme Court held the defendants properly joined, 83

Kan. 562, and this ruling of the State Court will be followed by this Court on this question as shown by authorities herein cited, and Southern Ry. vs. Miller, Supra.

In Alabama Great Southern Railway Co. vs. Thompson, Admr., 200 U. S. 206, the Court says:

"A case in which plaintiff, in good faith, has elected to sue jointly in tort a foreign corporation and its servants whose misconduct caused the injury complained of, does not—even though such joinder may be improper—present a separable controversy between plaintiff and the corporation, which, under the act of March 3, 1875, as amended, can be removed from a state to a Federal circuit court without regard to the citizenship of the individual defendants."

THE FACT THAT THE ENGINEER IS CHARGED IN THE COMPLAINT WITH NEGLIGENT MANAGEMENT OF THE ENGINE AND THAT THE RAILWAY COMPANY IS CHARGED WITH CARELESSLY RETAINING JOHNSON IN ITS EMPLOY WHILE KNOWING HIM TO BE UNFIT, ETC., DOES NOT RENDER THE CONTROVERSY SEPARABLE.

A few decisions of the District Judges seem to hold that such a charge raises a separable controversy, justifying removal. Such decisions are clearly against the great current of authority, including all of the recent decisions of the U. S. Supreme Court herein cited.

In Southern Railway Company vs. Miller,

in first Ga. App. 616, 57 S. E. 1090, (Affirmed in this court), it is said:

"The proposition that the declaration contained a misjoinder of defendants because the liability of the Railway Company is statutory and that of the other defendants is common law liability, we do not think is meritorious. We do not think it makes any difference whether the liability of one defendant arises from statute and the other from common law. The principal question is: Is there a liability and are the defendants all liable? And the particular source from which the liability of each defendant emanates cannot be material. The courts' judgment is based on the liability of the defendant whether statutory or common law, either one or both. Nor do we think it makes any difference on the question of liability that the plaintiff was an employee. He certainly can bring suit against the employer and we do not see why he could not join with the employer the employees whose negligence hurt him. In the conduct of their business the employees of a railway company owe a duty to exercise ordinary care to all other employees, etc."

The above case was affirmed and the opinion of the court upheld in pretty much the same language by this court in the same case on error to the State Court in Southern Railway Company vs. Miller, 217 U. S. 209, 54 L. Ed. 732.

The same doctrines was announced in Painter vs. C. B. & Q. Railroad, 177 Fed. 517,

where many authorities are collected, and where it is held, Syl. 1.

"That an action for death against a railroad company and conductor in its employ is based as against the railroad company on 1909, Neb. statutes, etc., providing that every railroad company shall be liable for damage inflicted on passengers, while the liability of the employee is for negligence under the common law, does not present a separable controversy so as to enable the railroad to remove the cause, etc."

C. B. & Q. R. R. vs. Willard, 220 U. S. 413.

Charman vs. Lake Erie R. R., 105 Fed. 449.

Nor would the fact that the injured party is a fellow servant of the plaintiff relieve either of the defendants from joint liability in this case, or in any like case. For in Kansas and most of the other states, the fellow servant doctrine is abrogated and the master is made liable to a servant for the negligence of his fellow-servants; but this does not relieve the servant himself from liability to his fellow-servant for acts of misfeasance, or wrong doing, as hereinabove shown by the many authorities cited to that effect.

It is the statute law of Kansas:

"That railroads in this state shall be liable for all damages done to person or property,

when done in consequence of any neglect on the part of the railroad companies." Gen. Statutes of Kansas, 1909, Sec. 6998.

"Every railroad company, organized or doing business in the State of Kansas, shall be liable for all damages done to any employee of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employees, to any person sustaining such damage," etc. Sec. 6999, Gen. Stat. of Kan. 1909.

Thus the railway company in this case was liable to the plaintiff by virtue of said statutes, even if it be conceded that the plaintiff was a fellow-servant with the defendant, Johnson. We claim, however, (although immaterial in this case), that it was also liable at common law, for failure to provide plaintiff a safe place in which to work, and safe employees to work with, etc., as charged in the complaint. The defendant, Johnson, on the other hand, was at least liable at common law for misfeasance and carelessness, resulting in injury to plaintiff.

See Doherty vs. Yazoo & M. Ry., C. C. A.

122 Fed. 205, where misjoinder of causes of action is charged.

In that case the Pullman Company and its employees were joined with the railway com-

pany as defendants in an action for damages. The court says, that,

"They allege that the sufficiency of the road bed and the proper handling of the train are matters of defense with which the Pullman Company has no concern, and, moreover, that, not being a common carrier, it is under no duty to exercise the same high degree of care required of the railroad company; that the complaint involves quite different lines of defense on the part of the two defendants."

The court cited the uniform line of recent decisions of the Supreme Court of the United States to the effect that this question involved the merits of the action and could not be considered in determining whether the cause was removable to the Federal Court where the defendants are charged in good faith (though it may be erroneously) as joint tort feasors.

In the American Bridge Co. vs. Hunt, 130 Fed. 302, (C. C. A. Sixth Circuit) it was held that the case was not removable where the defendant corporation was charged with common law negligence in furnishing an unsafe crane and appliance and in providing and knowingly keeping in its employ an unfit and incompetent servant, and that the injury complained of resulted from the concurrent negligence of the corporation and its said servant. The court held

that the defendants were joint tort feasors and could be sued jointly, notwithstanding the character of the negligence of the individual servant in handling the crane in question was different in character from the negligence of the defendant corporation in retaining the servant in its employ while he was unfit and incapable. The court says:

"The plaintiff elected to join the corporation with three individual defendants and to sue the defendants thus joined as joint tort feasors, and if he has stated on the face of his pleadings a cause of action which is joint he had a right to maintain his suit against all who are liable to him, even though he might have brought separate suits for the same tort against each of those he has chosen to join; nor does the fact that each defendant so sued might present separate and different defenses defeat the right to sue them in one action. The test of the entirety of the action and the consequent right to join several defendants in one suit, is found in the legal concert or identity of the defendants in the same tortous act or in concurring acts of negligence contributing to the same injury."

Again on page 305:

"Thus we have the negligence of the company in respect to its duty in furnishing a reasonably safe appliance and competent fellow-servants concurring with the negligence of the defendant, Calvin Guthrie in the management

of the defective crane to bring about the injury to the decedent."

The case was held not removable.

In Brown vs. Cox Brothers, 75 Fed. 689, Syllabus two, reads:

"Plaintiff alleged that, while employed on a steamboat, he was injured by the falling of a coal bucket operated by one C., and that C. was negligent in using defective machinery, and in operating it negligently, and that the steamboat owner was negligent in not providing him a safe place for work, and in not warning him of the danger. Held, that as the alleged acts of negligence of C. and the steamboat owner, though distinct in themselves, concurred in producing the injury, their liability was joint as well as several."

It was claimed by the defendants in above case that the complaint stated a separate cause of action against each defendant, the one against the employes for negligence in the use of the machinery and the other against the owner of the vessel for failure to furnish safe machinery and failure to give him warning.

But in the opinion the court says:

"But the rule under which parties become jointly liable as tort feasors extends beyond acts of omissions which are designedly co-operative, and beyond any relation between the wrong doers. If their acts of negligence, however,

separate and distinct in themselves, are concurrent in producing the injury, their liability is joint as well as several. 1 Suth. Dam. 212. Each becomes liable because of his neglect of duty, and they are jointly liable for the single injury inflicted because the acts of omissions of both have contributed to it."

To same effect Hoye vs. G. N. Ry. 120 Fed. 712; also 33 Cyc. 726.

In Jacobson vs. Chicago R. R., et al, 176 Fed. 1004, supra, where the defendant corporation was charged with providing a defective platform and the individual defendant was charged with negligence in failing to inspect it, the court held the parties jointly liable as joint tort feasors and that the case was not removable.

In Charman vs. Railway Company, 105 Fed. 449, supra, the railway company was charged with furnishing defective engines and the yardmaster with carelessly allowing same to run over plaintiff as in the case at bar. The court held that there was no separable controversy and denied the petition for removal.

It may not therefore be claimed in this case, that the company's act of negligence in employing an unfit engineer, is an act in which the engineer could not participate, and that the alleged negligence of the defendant was not concurrent

in that respect, and that therefore a separable controversy with the Railway Company alone, arises. Some two or three decisions, cited by plaintiff in error, have been rendered by the Federal District Judges on that theory; these decisions, however, are directly in the face of the general current of authority in State and Federal Courts on the subject. The question is not as to whether the defendant engineer concurred or participated in the act of the defendant railway in negligently retaining such engineer in its employ while he was unfit and incompetent, but is, as to whether the negligent act of the engineer, in managing the engine, concurred with the negligent act of the Railway Company in knowingly retaining such engineer in its employ in causing the one indivisible injury, as charged in the complaint. Did two or more different acts of negligence, unite or concur in causing the one single injury as charged and did plaintiff choose to charge them jointly? And such is the law announced in the foregoing cases, all bearing directly on the point in question.

It is said in Charmon vs. The Lake Erie, supra, 105 Fed., page 454:

"Hence it is apparent that it is not necessary to the maintenance of a joint action for tort

that the injury should grow out of the breach of a joint duty, nor out of the same or similar duties deducible from the same or similar principles of law." Many authorities are here cited.

The question herein is not whether there were two causes of action for this single injury, or whether liability is under common law or statute, but whether plaintiff could sue two parties jointly engaged in producing the same single injury by different means and with different implements, and through different acts of omission and commission.

So. Ry. vs. Miller, 217 U. S., 209;
Arnold vs. Hoffman, 86 Kan. 12;
Brown vs. Cox Bros., 75 Fed. 689;
38 CYC. 488;
Durand vs. Ry. 65, Kan. 380;
Morris vs. Railway, 175 Fed. 491;
W. & W. Ry. vs. Beebee, 39 Kan. 465;
Luengene vs. Consumers, etc., 86 Kan. 866, pp. 866, 876;
Kansas City vs. File Co., 60 Kan. 157.

Moreover, the undisputed rule now is that where tort feasors are, in good faith, attempted to be joined, one cannot remove on the ground of a separable controversy.

Chesepeake & Ohio Ry. Co. vs. Dixon, 179, U. S. 131;
C. B. & Q. Ry. vs. Williard, 220, U. S. 413;

I. C. R. R. vs. Sheegog, 215 U. S. 308, (54 L. Ed. 208);
Southern R. R. vs. Miller, 217 U. S. 209, (54 L. Ed. 732);
Enos vs. Ky. Distilling Co., 189 Fed. (C. C. A.) 342;
Alabama Ry. vs. Thompson, 200 U. S. 206.

As to mistake in pleading or misconception as to causes of action.

However, in C. B. & Q. Ry. Co. vs. Willard, 220 U. S. 413, it is further held, that even if the plaintiff has misconceived his cause of action, and had no right to prosecute the defendants jointly, it still does not become a separable controversy if the plaintiff believed that he did in fact have such right, and attempted in good faith to charge them jointly in one suit The court quotes and approves the following doctrine drawn from many former decisions:

"Does it become a separable controversy because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think in the light of the adjudications above cited from this court it does not," etc.

Followed in Enos vs. Ky. Distilling Co., 189 Fed. (C. C. A.) 342; McGarvey vs. Butte Miner,

199 Fed. 671; see also Keller vs. Ry. 135 Fed. 202; Alabama & Gt. So. Ry. vs. Thompson, 200, U. S. 206.

Suppose, however, there were two causes of action stated in the case at bar. In Louisville & N. R. R. Co. vs. Ide, 114 U. S. 52, (29 L. Ed. 63), the court said that separate answers by several defendants sued on joint causes of action might present different questions for determination; but they did not necessarily divide the suit into separate controversies. "A defendant has no right to say that an action should be several which a plaintiff elected to make joint. A separate defense might defeat a joint recovery; but it could not deprive a plaintiff of his right to prosecute his own suit to final determination in his own way."

In Alabama G. S. R. R. Co. vs. Thompson, 200 U. S. 206, (50 L. Ed. 441), where the railway company and its engineer were joined as defendants, as in the case at bar, the court said that the fact that by answer the defendant might show that a joint liability sued on was several, or that plaintiff misconceived his cause of action could not change the character of the case made by the plaintiff in his pleadings so as to affect the right of removal. The complaint of the plaintiff, and

not the petition for removal, determined the question as to whether or not a separable controversy exists. So in Wilson vs. Oswego Twp.. 151 U. S. 67, (38 L. Ed. 75); Cincinnati Ry. vs. Bohon, 200 U. S. 221.

In the Bohon case and the Thompson case it was held the railway company and its engineer could be sued jointly, and the case was not removable.

NO FRAUD PROPERLY PLEADED OR PROVEN.

In Hukill vs. Maysville R. R. 72 Fed. 745, it is said that if one has a cause of action against two joint tort feasors it could not be a fraud to join them, although the plaintiff would not have brought in the resident defendant except to avoid the jurisdiction of the Federal Court, and it was added:

"Where he has reasonable ground for a bona fide belief in the facts upon which the liability of all the defendants depends, his motive in joining them cannot be questioned. It is only where he has not, in fact, a cause of action against the defendants, and has no reasonable ground for supposing that he has, and yet joins them, in order to evade the jurisdiction of the Federal Court, that the joinder can be said to be fraudulent, entitling the real defendant to removal." (p. 750).

And in McGarvey vs. Butte, 199 Fed. 671, it is said:

"Fraudulent joinder of defendants, in order to justify removal of the cause must in general essentially consist in a wilful or negligent misstatement of the fact," citing C. B. & Q. Ry. Co. vs. Willard.

And it is unqualifiedly held in C. B. & Q. Ry. Co. vs. Willard, 220 U. S. 413, supra, that:

"Fraudulent joinder of a resident with a non-resident defendant for the purpose of defeating the removal of the cause of the Federal Court **cannot be established,** where, by the settled law of the state in which the action was brought both defendants were jointly liable to suit."

So in Shane vs. Butte Electric Ry., 150 Fed. 801; McGarvey vs. Butte Miner Co. et al, 199 Fed. 671; the court says:

"Where, in an action for libel against two defendants, the cause was removed by one of them on the ground that the joinder was fraudulent, and that the other defendant was not liable, but it appeared that the law was locally unsettled and fairly debatable, the complaint could not be said to show fraudulent joinder on its face, and, the exercise of the right to join being a matter to be settled on the trial, the cause would be remanded."

Fraudulent joinder of defendants, in order to justify removal of the cause, must in general essentially consist in a willful or negligent misstatement of fact."

Alabama Ry. vs. Thompson, 200 U. S. 206.

Doherty vs. Yazoo Ry. 122 Fed. (C. C. A.) 205.

Now when can it appear from the pleadings that the plaintiff has joined the defendants in bad faith? Before bad faith, justifying a removal can be shown from the pleadings, it must appear on the face thereof that the defendants were not jointly liable and that plaintiff nevertheless, charged them jointly for the fraudulent purpose of preventing a removal to the Federal Court, and with that end in view knowingly made fictitious and false allegations of facts for the purpose of making a fictitious claim against one of the defendants. Then in such a case, the party seeking to remove, must attack in his petition for removal, these fictitious allegations and set forth all the facts and circumstances showing the fraudulent intent of the plaintiff. This petition for removal must stand or fall as a pleading, and must be a sufficient pleading of the fraud.

In Illinois Central Railroad vs. Sheegog, 215

U. S. 308, (54 L. E. 208), the court says in a similar case:

"On the other hand the mere epithet 'fraudulent' in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability the plaintiff has an absolute right to elect and to sue the joint tort feasors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent without other ground for the charge than that its only purpose was to prevent removal would be bad on its face."

And again, in the same opinion, the court says:

"The joint liability gave the plaintiff an absolute option to sue both if he preferred, and no motive could make his choice a fraud; the only way by which fraud could be made out would be by establishing that the allegations of the cause of action against the Central Road was fraudulent, or at least in part of it for which its lessor possibly could be held. But it seems to us to allow that to be done on such a petition as is before us would be going too far in an effort to counteract evasions of federal jurisdiction."

Followed in the case at bar, Dowell vs. Ry. 83 Kan. 562, Syl. 4.

As to the alleged question of fraud in joining the individual defendants, Judge Lamm in Stotler vs. Chicago & Alton Ry. Co. et al, 200

Mo. l.c. 119-120, very aptly said in discussing the alleged fraudulent joinder of a conductor and engineer:

"That question becomes an edged tool, dangerous to meddle with, because on this record it is as easy to say that defendants injected the question of fraud into the petition of removal for the purpose of defeating the jurisdiction of the State Court as it is to say that plaintiff joined Wiseman and Haines, residents of Missouri, with the defendant corporation, a non-resident, for the purpose of defeating the jurisdiction of the Federal Court."

In Chicago, B. & Q. R. Co. vs. Willard, 220 U. S. 413, of the joinder of parties it is said:

"He may have preferred to have the case tried in the State Court just as the Iowa corporation preferred the Federal Court. But these preferences or motives, not fraudulent or unnatural, were of no consequence. They were immaterial in determining whether the plaintiff had a legal right to bring a joint action against the lessor and lessee companies and to carry it on in that form to a conclusion."

On this question, Johnson J. in delivering the opinion of the Kansas City Court of Appeals (Schwyhart vs. Barrett et al, 145 Mo. App., l.c. 348), speaking of the relative poverty or wealth of the defendants as a matter upon which fraud can be predicated, says:

"The only remaining facts on which the conclusion is founded are that the indivdual defendants are men of small means and that the defendant company is solvent and of great wealth. These facts alone would not support a conclusion of fraud. A person injured by the wrong of another has a right to seek a judgment at law against the wrongdoer, regardless of the question of whether he can collect the judgment, if one should be recovered. (Stotler vs. Railroad, supra, 200 Mo. 107). A plaintiff's motives should not be impugned from the bare fact that he chooses to join solvent and insolvent defendants in the same action. With all of the facts alleged conceded to be true, the conclusion of fraud still would fail for lack of support."

So it is alleged in the petition for removal herein that defendant, Johnson, is a man without means, while the railway company is financially responsible. This is no evidence of fraud, however, if plaintiff had a right to sue both defendants. It has been decided that:

"A defendant who is legally liable together with another and whose presence defeats the right of removal is neither a nominal nor a sham party merely because he is pecuniarily irresponsible so that a judgment against him would be of no value."

Deere-Wells & Co. vs. Chicago Ry., 85 Fed. 876; see also Welsh vs. Cincinnati & N. O. Ry. 177 Fed. 760; Shane vs. Butte Electric, 150 Fed. 801; Hough vs. So. Ry. 57 S. E. Rep. 469, (Syl. 6); C. B. & Q. Ry. vs. Willard, 220 U. S. 413; Schy-

hart vs. Barrett, 130 S. W. 388, Syl. 7, 145 Mo., App. 332; Dowell vs. Ry. 83 Kan. 562, 570.

See the very recent case of C. B. & Q. Ry. vs. Willard, where it was claimed that one of the defendants was joined with the fraudulent purpose of preventing a removal of the case. The court in the above case said no fraud was shown:

"Although the lessor may have been joined for the purpose of excluding the Federal Jurisdiction. Fraudulent joinder of a resident with a non-resident defendant for the purpose of defeating the removal of the cause to a Federal Court cannot be established, where, by the law of the state in which the action was brought, and in which the cause of action arose, both defendants were jointly liable to suit." (Syl. 2 and 3).

In every pleading by which the existence of fraud is put in issue the facts constituting fraud must be distinctly and directly averred. General allegations and mere conclusions of law are insufficient. Stearns vs. Page, 7 Howard, 819 to 829, (12 L. Ed. 928 to 932); Wood vs. Carpenter, 101 U. S. 135 (25 L. Ed. 807).

Dowell vs. Ry. 83 Kan. 562, 568; Black's Dillon on Removal of Causes, Sec. 76; Desty's Federal Procedure, 9th Ed. Pages 478 and 479; Southern Railway vs. Sittasen, 74 N. E. 898; Hough vs. Southern R. R., 57 S. E. 469; Tobacco

Co. vs. Tobacco Co., 57 S. E. 5; Ward vs. Pullman, 114 S. W. 754; Jacobson vs. Chicago Railway, 176 Fed. 1004; Welsh vs. R. R. 177 Fed. 760; R. R. vs. Vincent, 95 S. W. 180; K. P. & W. R. R. vs. Quinn, 45 Kan. 477; Ladd vs. Nystol, 63 Kan. 23; Warax vs. Cincinnati & N. O. Ry. 72 Fed. 637; Offner vs. Chicago & E. R. Co. 148 Fed. 201.

In the case at bar the allegations of fraud in the petition for removal are insufficient and present no issuable fact.

Little York Gold Co. vs. Keyes, 96 U. S. 656.
I. C. R. R. vs. Sheegog, 215 U. S. 308.
Chicago B. & Q. R. Co. vs. Willard, 220 U. S., l.c. 426.

As to whether there is a controversy warranting a removal to the Federal Court must be determined by the state of the pleadings, and the record of the case at the time of the application for removal. Wilson vs. Oswego Twp. 151 U. S. 67, (38 L. Ed. 75); Louisville & N. Co. vs. Wangelin, 132 U. S. 599, (33 L. Ed. 474); Merchants' Cotton Press & Storage Co. vs. Insurance Co. of N. A. 151 U. S. 368, (38 L. Ed. 195); Laden vs. Meck, 65 C. C. A. 361; 130 Fed. 877; Thomas vs. Great Northern R. Co. 147 Fed. 83; Cleveland vs. C. C. & St. L. R. Co., 147 Fed. 171.

Therefore, the detached portion of the testimony of the illiterate and almost halfwitted plaintiff, as to why he joined Engineer Johnson as defendant referred to by opposing counsel, is immaterial here. It was given at the trial, after the rights of removal to the Federal Court had been determined. The testimony has no proper place in the record in this court, moreover, it shows on its face the illiteracy of plaintiff and that he relied on his attorneys to assert his rights in the courts. (Transcript of Record, pp. 12-14). That he did not know his rights was no cause that they should be forfeited, and placed the burden the more heavily on the shoulders of his lawyers to safeguard them. The mental capacity of plaintiff was one of the questions of fact involved in the case below before court and jury. See this case in 83 Kansas 563, Syl. 3.

Plaintiff could hardly understand the plainest questions.

Q. Mr. Dowell is it true that you, at the time you brought this suit and at the present time, are depending entirely upon the liability of the railway company in this case? A. At the time I brought the suit?

Q. (Question repeated). A. I was living off the money. Yes, sir.

Q. (Question repeated). A. Yes, sir. (Transcript, p. 13).

Q. Didn't you make Johnson, engineer, defendant for the purpose of preventing the railway company from taking this case out of the District Court here and taking it to Wichita? A. The lawyers brought the case, I don't know what they brought it that way for. (Transcript, p. 12).

Q. Why do you say you don't expect to get any judgment against Johnson? A. Well, I don't know how to answer that.

Q. Do you know of any reason why you should not? A. No, sir. (Transcript, p. 14).

It would be hard to require of this plaintiff to determine at his peril as to who he should "expect" a judgment against or as to who he had a right to procure judgment against, in a matter involving the questions that have been argued in this case. It is hard for the lawyers to determine such questions themselves. The fact is, the plaintiff did procure a verdict and judgment against the engineer, as well as against the railway company, before the jury and trial court and it was affirmed in the Supreme Court. His failure to "expect" what he was actually entitled to, does not amount to fraud. It was

plain ignorance of his rights, and he relied solely on his attorneys to proceed according to their knowledge and not according to his expectations.

Moreover, at the time this testimony was given, the petition for removal had been passed on by the trial court adversely to the railway company, and the mere fact that the trial court, at the request of the railway company, needlessly allowed this testimony to be introduced does not have the effect of giving the railway company a second opportunity to remove the case to the Federal Court. The time for making the application had passed, and even if it had not passed, and even if it had the right to make the motion again at the time of the trial on the ground that the evidence deduced showed fraud, the fact remains that the evidence utterly failed to show such fraud. Even if the evidence had failed to show any cause of action whatever against Johnson, and if the jury had returned a verdict in favor of defendant, Johnson, instead of one against him, this would not have shown fraud in the bringing of the suit or justified a removal to the Federal Court.

As said in somewhat similar case in I. C. R. R. Company against Sheegog, 215 U. S. 308, "It may be mentioned here that the jury found

for the other two defendants and against the I. C. R. R. Company, but that fact has no bearing upon the case." Citing Whitcomb vs. Smithson, 175 U. S. 653.

"Where the cause of action is joint, the plaintiff may join a defendant though the purpose is to prevent removal to the Federal Court." Edinburgh vs. Insurance Stove Co., 168 Fed. 1001; Hukill vs. M. & B. Railway Co., 77 Fed. 750; Thresher vs. W. U. Telegraph Co., 148 Fed. 651; Gustafson vs. C. R. I. & P. Railroad Co., 128 Fed. 85, and many other authorities herein cited."

In C. B. & Q. R. R. vs. Willard, 220 U. S., 413, Syl. 3, reads: "Fraudulent joinder of a resident with a nonresident defendant, for the purpose of defeating the removal of the cause to a Federal Court, cannot be established, where, by the settled law of the state in which the action was brought, and in which the cause of action arose, both defendants were jointly liable to suit."

See Southern Railway vs. Railway, 194 U. S. 136. See I. C. R. R. vs. Houghins, 1st L. R. A. (N. S.) 375 and note thereto. Also Ward vs. Pullman, 114 Southwestern 754.

AGAIN: The petition for removal presented by the railway company on the trial at the

close of the evidence was the same old petition which the trial court had previously held insufficient and defective, which ruling the Supreme Court of the state affirmed. So when the same petition was presented at the trial without amendment the court properly overruled same, as it had not only spent its force but was still defective and insufficient, Jones vs. Moser, 107 Fed. 561. But even if it had been amended the evidence relied on by plaintiff to show fraud was wholly insufficient for said purpose as above shown.

Moreover: These questions of pleading and practice were for the state courts to determine and are not subject to review here. The trial court had jurisdiction, at least, till after the evidence was closed at the trial; now how could it lose jurisdiction, without any change of pleadings? It surely had power to pass on weight of testimony and determine the procedure. At what moment did it lose jurisdiction if at all? We submit that the procedure at the trial is not before this court for review, and we deny that any error was committed.

The two following cases are directly in point on questions involved herein.

In Illinois Central R. R. Co. vs. Sheegog, 215 U. S. 308, (54 L. Ed. 208), the Court says:

"The defendant in error brought this action for causing the death of his intestate, John E. Sheegog, by the throwing off the track of a railroad train upon which the deceased was employed as an engineer. The defendants were the conductor of the train, the Illinois Central Railroad Company, which was operating the railroad and owned the train, and the Chicago, St. Louis & New Orleans Railroad Company, which owned the road which had let the same to the first-mentioned road. It was alleged that through the negligence of both companies the roadbed, track, etc., were in an improper condition; that through the negligence of the Illinois Central the engine and cars were in an improper condition; that through the negligence of the Illinois Central the engine and cars were in an improper condition; and that the death was due to these causes acting jointly, the negligence of the Illinois Central in permitting its engine, cars, and road to be operated while in such condition, and the negligence of the conductor in ordering and directing the management of the train.

In due season the Illinois Central Railroad Company, being an Illinois corporation, filed its petition to remove. The difficulty in its way was that the other two defendants were citizens and residents of Kentucky, to which state the plaintiff also belonged. To meet this the petition alleged that the plaintiff had joined these parties as defendants solely for the purpose of preventing the removal. It admitted the lease, and averred that the Illinois Central Company operated the road exclusively, and alone em-

ployed the deceased. It went on to allege that the charge of joint negligence against the lessor and lessee in causing the wreck, as stated, was made only for the above purpose, and was fraudulent and knowingly false. The question is whether these allegations were sufficient to entitle the petitioner to have its suit tried in the Federal Court. It may be mentioned here that the jury found for the other two defendants and against the Illinois Central Railroad Company, but that fact has no bearing upon the case. Whitcomb vs. Smithson, 175 U. S. 653, 637, 44 L. Ed. 303.

Of course, if it appears that the joinder was fraudulent, as alleged, it will not be allowed to prevent the removal. Wecker vs. National Enameling & Stamping Co., 204 U. S. 176, 51 L. Ed. 430, 9 A. & E. Ann. Cas. 757. And further, there is no doubt that the allegations of fact, so far as material, in a petition to remove, if controverted, must be tried in the court of the United States, and therefore must be taken to be true when they fail to be considered in the state courts. Crehore vs. Ohio & M. R. R. Co., 131 U. S. 240, 244, 33 L. Ed. 144, 145; Chesapeake & O. R. Co. vs. McCabe, 213 U. S. 207, 53 L. Ed. 765. On the other hand, the mere epithet "Fraudulent" in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability, the plaintiff has an absolute right to elect, and to sue the tort feasors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that if its only purpose was to prevent removal, would be bad on its

face. Alabama G. S. R. Co. vs. Thompson, 200 U. S. 206, 50 L. Ed. 441, 161, 4 A. & E. Ann. Cas. 1147; Cincinnati, N. O. & T. P. R. Co. vs. Bohon, 200 U. S. 221, 50 L. Ed. 448, 4 A. & E. Ann. Cas. 1152. * * *

We assume, for the purpose of what we have to say, the the allegations concerning the lessor state merely a conclusion of law from the acts and omissions charged against its lessee. Or, if they be taken to be allegations of fact, we assume, again merely for the purposes of decision, that they are effectively traversed by the petition to remove. The Kentucky court of appeals appears to us to have discussed the case on this footing. Whether it did or not, the question whether a joint liability of lessor and lessee would arise from the acts and omissions of the Illinois Central Railroad Company alone was a question of Kentucky law for it to decide, and it appears to us to have decided it. * * *

The joint liability arising from the fault of the Illinois Central Road gave the plaintiff an absolute option to sue both if he preferred, and no motive could make his choice a fraud. The only way in which fraud could be made out would be by establishing that the allegation of a cause of action against the Illinois Central Railroad was fraudulent, or, at least, any part of it for which its lessor possibly could be held. But it seems to us that to allow that to be done on such a petition as is before us would be going too far in an effort to counteract evasions of Federal jurisdiction. We have assumed, for purposes of decision, that the railroad held on what may be called a secondary ground is to be charged, if at all, only for its lessee. But when we come to the

principal and necessary defendant, a man is not to be prevented from trying his case before that tribunal that has sole jurisdiction, if his declaration is true, by a mere allegation that it is fraudulent and false. The jury alone can determine that issue, unless something more appears than a naked denial. Louisville & N. R. Co. vs. Wangelin, 132 U. S. 599, 603, 33 L. Ed. 474, 476; Chesapeake & O. R. Co. vs. Dixon, 179 U. S. 131, 138, 45 L. Ed. 121, 124. However, the petition for removal hardly raises this point. For it directs itself wholly against the allegations of joint negligence, and does not attempt to anticipate the trial on the merits so far as the conduct of the Illinois Central is concerned."

In C. B. & Q. Ry. vs. Willard, 220, U. S. 413, it is said:

"It is thus made clear that if the plaintiff had any cause of action on account of the injury in question, he could bring a joint action in an Illinois court against the lessor and lessee companies. Whatever liability was incurred on account of the death of the plaintiff's intestate could, at the plaintiff's election, be asserted against both companies in one joint action, or, at his election, against either of them in a separate action. In Powers vs. Chesapeake & O. R. Co. 169 U. S. 92, 96, 97, 42 L. Ed. 673-675, which was an action against a railroad company and several of its servants for negligence resulting in an injury alleged to have been caused by the joint negligence or carelessness of all the defendants, the court, speaking by Mr. Justice Gray, said: "It is well settled that an action of tort, which might have been brought against many

persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said: 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'" citing Pirie vs. Tvedt, 115 U. S. 41, 43, 29 L. Ed. 331, 332; Sloane vs. Anderson, 117 U. S. 275, 29 L. Ed. 899; Little vs. Giles, 118 U. S. 596, 600, 601, 30 L. Ed. 269-271; Louisville & N. R. Co. vs. Wangelin, 132 U. S. 599, 33 L. Ed. 474; Torrence vs. Shedd, 144 U. S. 527, 530, 36 L. Ed. 528, 531; Connell vs. Smiley, 156 U. S. 335, 340, 39 L. Ed. 443, 444.

In the case of Alabama G. S. R. Co. vs. Thompson, 200 U. S. 206, 216, 218, 50 L. Ed. 441, 446, 447, 4 A. & E. Ann. Cas. 1147, after referring to Louisville & N. R. Co. vs. Ide, 114 U. S. 52, 29 L. Ed. 63, in which Chief Justice Waite said that a defendant had no right to say that an action shall be several which a plaintiff elects to make joint, this court, speaking by Mr. Justice Day, said: "The language is used of an action begun in the state court; and it is recog-

nized that the plaintiff may select his own manner of bringing his action, and must stand or fall by his election. If he has improperly joined causes of action, he may fail in his suit; the question may be raised by answer and the right of the defendant adjucated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal. (Wilson vs. Oswego Twp. 151 U. S. 56, 66, 38 L. Ed. 70, 75), and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill, or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal," citing the above cases, and, in addition, Louisville & N. R. Co. vs. Ide, 114 U. S. 52, 29 L. Ed. 63; Graves vs. Corbin, 132 U. S. 571, 33 L. Ed. 462; East Tennessee, V. & G. R. Co. vs. Grayson, 119 U. S. 240, 30 L. Ed. 382; Chesapeake & O. R. Co. vs. Dixon, 179 U. S. 131, 45 L. Ed. 121; Southern R. Co. vs. Carson, 194 U. S. 136, 48 L. Ed. 907. Again, in the same case: "Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not

change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the Federal Court."

It results that, upon the face of the record, the action throughout was proceeded in as a joint action, and that there was no separable controversy in such an action, entitling the Iowa corporation, as matter of law, to remove the case from the state court. And it cannot be predicated of the plaintiff that he fraudulently and improperly made the Illinois corporation a co-defendant with the Iowa corporation when such a charge is negatived, as matter of law, by the fact that the plaintiff was, as we have seen, entitled under the laws of Illinois, where the cause of action originated and within which the road in question was located, to bring a joint action against the Illinois and Iowa companies. Illinois C. R. Co. vs. Sheegog, 215 U. S. 308, 316, 54 L. Ed. 208, 211. He may have preferred to have the case tried in the state court, just as the Iowa corporation preferred the Federal court. But these preferences or motives, not fraudulent or unnatural, were of no consequence. They were immaterial in determining whether the plaintiff had a legal right to bring a joint action against the lessor and lessee companies, and to carry it on in that form to a conclusion. The silence of the parties, at the trial or in the appellate court,

on the question of jurisdiction, could not, in disregard of the judiciary act, confer authority on the circuit court to try the case. The circuit court of appeals, therefore, properly, of its own motion, reversed the judgment of the trial court, and sent the case back to the circuit court, with instructions to remand it to the state court."

The cases cited in the appendix of the Brief of Opposing Counsel are nearly all decisions of the U. S. Supreme Court and are contrary to many of the isolated decisions of the district judges cited in their brief proper. Counsel have tried to distinguish them from the case at bar, but without avail. We confidently rely on those cases, and would necessarily have cited them herein, had they not already been referred to in the opposing brief.

No. 21.

The decision of the Supreme Court of the State of Kansas, which is sought to be reversed, in these proceedings by the Railway Company, is exhaustive, and sets forth the law of that state, on the questions here involved, and the interpretation of that Court, on the Federal decisions controlling same, and is in complete harmony with the later decision of this court in C. B. & Q. R. R. vs. Willard, 220 U. S. 413, wherein

every doctrine announced by the Kansas Court under the Federal decisions is reaffirmed.

Respectfully submitted,

J. D. HOUSTON,
DAVID SMYTH,
Attys. for Deft. in Error.

F. S. MACY,
HYDE & STALCUP,
C. H. BROOKS,
Of Counsel.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* DOWELL.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 208. Submitted April 14, 1913.—Decided May 26, 1913.

Quære, whether liability to a third person against the master may result from the servant's neglect of some duty owing to the employer alone.

Positive acts of negligence on the part of an engineer while engaged in his employer's business toward a fellow-servant, are acts of misfeasance for which he is primarily liable notwithstanding his contract with his employer and the liability of the latter under the state statute.

If plaintiff allege that the concurrent negligence of both defendants caused his injury, he may join them in one action; and if he do so the fact that he might have sued them separately furnishes no ground for removal.

Whether or not defendants are jointly liable depends on plaintiff's averments in the statement of his cause of action, and it is a question for the state court to decide.

If the state court so decides, a plaintiff may join joint tort-feasors even though the liability of one is statutory and the liability of the other rests on the common law.

While issues of fact arising on the controverted allegations in a petition for removal are only triable in the Federal court, the state court may deny the petition if it is insufficient on its face.

Mere averment that a resident defendant, in this case an employé of small means, is fraudulently joined with a non-resident defendant of undoubted responsibility for the purpose of preventing removal by the latter, is not sufficient to raise an issue of fraud in the absence of other averments of actual fraud. The motive of plaintiff in such a case is immaterial; if the right of joinder exists he can exercise it.

83 Kansas, 562, affirmed.

THE facts, which involve the construction of the Removal Act and what constitutes a separable controversy as to a non-resident defendant sued jointly with a resident defendant, are stated in the opinion.

Mr. F. C. Dillard and *Mr. Paul E. Walker* for plaintiffs in error:

The petition for the removal of the suit to the United States court should have been allowed, as the controversy was separable.

The State of Kansas prohibited the joinder of the several causes of action. 3 Am. and Eng. Anno. Cases, pp. 283, 285; *Atchison, T. & S. F. Ry. Co.* v. *Sumner County*, 51 Kansas, 617; *Benson* v. *Battey*, 70 Kansas, 288; *Enos* v. *Kentucky Distilleries*, 189 Fed. Rep. 342; *Griffith* v. *Griffith*, 71 Kansas, 547; *Harrod* v. *Farrar*, 68 Kansas, 153; *Haskell Bank* v. *Santa Fe Bank*, 51 Kansas, 39; *Hentig* v. *Benevolent Assn.*, 45 Kansas, 462; *Hudson* v. *Atchison County*, 12 Kansas, 141; *Hurd* v. *Simpson*, 47 Kansas, 372; *Illinois Central* v. *Sheegog*, 215 U. S. 308; *Jeffers* v. *Forbes*, 28 Kansas, 174; *Lindh* v. *Crowley*, 26 Kansas, 47; *Marshall* v. *Saline River Land Co.*, 75 Kansas, 445; *Mentzger* v. *Burlingame*, 71 Kansas, 581; *M'Allister* v. *Ches. & O. Ry. Co.*, 198 Fed. Rep. 660; *New* v. *Smith*, 68 Kansas, 807; *Nicholas* v. *Ches. & O. Ry. Co.*, 195 Fed. Rep. 913; *Palmer* v. *Waddell*, 22 Kansas, 352; *Ritzer* v. *Davis County*, 48 Kansas, 389; *State* v. *Addison*, 76 Kansas, 699; *State* v. *Reno County*, 38 Kansas, 317; *State* v. *Shufford*, 77 Kansas, 263; *Stewart* v. *Rosengren*, 66 Nebraska, 445; *Swenson* v. *Moline Plow Co.*, 14 Kansas, 387; *Veariel* v. *United Engineering Co.*, 197 Fed. Rep. 877.

The removing defendant was liable, if at all, under the terms of the Kansas statute; the resident defendant, if at all, only under the rules of the common law. The causes of action were therefore separable. *Alaska Mining Co.* v. *Whelan*, 168 U. S. 86; 8 Am. & Eng. Anno. Cas., p. 233; *Ayers* v. *Commissioners*, 37 Kansas, 240; *Balt. & O. R. Co.* v. *Baugh*, 149 U. S. 368; *Buler* v. *Grand Trunk Ry. Co.*, 224 U. S. 85; *Central R. Co.* v. *Keegan*, 160 U. S. 259; *Chicago, R. I. & P. Ry. Co.* v. *Stepp*, 151 Fed. Rep. 908; *Henry* v. *Ill. Cen. R. Co.*, 132 Fed. Rep. 715; *Hoye* v. *Raymond*, 25 Kansas, 665; *Jackson* v. *Chicago, R. I. & P. Ry. Co.*, 178 Fed. Rep. 432; *Larned* v. *Boyd*, 76 Kansas,

37; *Lockard* v. *St. Louis & S. F. R. Co.*, 167 Fed. Rep. 675. *Martin* v. *Atchison, T. & S. F. R. Co.*, 166 U. S. 399; *McAllister* v. *Fair*, 72 Kansas, 533; *Nor. Pac. Ry. Co.* v. *Charless*, 162 U. S. 359; *North. Pac. Ry. Co.* v. *Hambly*, 154 U. S. 349; *Nor. Pac. Ry. Co.* v. *Peterson*, 162 U. S. 346; *Nor. Pac. Ry. Co.* v. *Poirier*, 167 U. S. 48; *Nor. Pac. Ry. Co.* v. *Dixon*, 194 U. S. 338; *New Eng. Ry. Co.* v. *Conroy*, 175 U. S. 323; *Prince* v. *Ill. Cent. Ry. Co.*, 98 Fed. Rep. 1; *Swartz* v. *Siegel*, 117 Fed. Rep. 13; *St. Paul, M. & M. Ry. Co.* v. *Sage*, 71 Fed. Rep. 40; *State* v. *Mosman*, 231 Missouri, 474; *Tex. & Pac. Ry. Co.* v. *Bourman*, 212 U. S. 536; *Un. Pac. Ry. Co.* v. *Wyler*, 158 U. S. 285; *Veariel* v. *United Engineering Co.*, 197 Fed. Rep. 877; *Webber* v. *St. Paul Ry. Co.*, 97 Fed. Rep. 140.

The decisions of this court do not establish principles in conflict with the contentions of the plaintiff in error. *Alabama G. Southern Ry. Co.* v. *Thompson*, 200 U. S. 206; *Chesapeake & O. Ry. Co.* v. *Dixon*, 179 U. S. 131; *Chicago, B. & Q. R. Co.* v. *Willard*, 220 U. S. 413; *Chicago, R. I. & P. Ry. Co.* v. *Martin*, 178 U. S. 245; *Cincinnati, N. O. & T. P. Ry. Co.* v. *Bohon*, 200 U. S. 221; *Dowell* v. *Chicago, R. I. & P. Ry. Co.*, 83 Kansas, 562; *East Tenn., V. & G. R. Co.* v. *Grayson*, 119 U. S. 240; *Ill. Cent. R. Co.* v. *Sheegog*, 215 U. S. 308; *Little* v. *Giles*, 118 U. S. 596; *Louisville & N. R. Co.* v. *Ide*, 114 U. S. 52; *Louisville & N. R. Co.* v. *Wanyclin*, 132 U. S. 599; *Pirie* v. *Tvedt*, 115 U. S. 41; *Plymouth Mining Co.* v. *Amador Canal Co.*, 118 U. S. 264; *Powers* v. *Ches. & O. Ry. Co.*, 169 U. S. 92; *Sloane* v. *Anderson*, 117 U. S. 275; *Southern Ry. Co.* v. *Carson*, 194 U. S. 136; *Southern Ry. Co.* v. *Miller*, 217 U. S. 209; *Stone* v. *South Carolina*, 117 U. S. 430; *Torrence* v. *Shedd*, 124 U. S. 527; *Whitcomb* v. *Smithson*, 175 U. S. 635.

The allegations of fact contained in the petition for removal were matters for the exclusive determination of the Federal court. *Arapahoe Co.* v. *Ry. Co.*, 4 Dill. 277; *Burlington, C. R. & N. Ry. Co.* v. *Dunn*, 122 U. S. 513;

Carson v. *Hyatt*, 118 U. S. 279; *Ches. & O. Ry. Co.* v. *McCabe*, 213 U. S. 207; *Crehore* v. *Ohio & Miss. Ry. Co.*, 131 U. S. 240; *Dudley* v. *Ill. Cent. R. Co.*, 96 S. W. Rep. 835; *Ill. Cent. R. Co.* v. *Sheegog*, 215 U. S. 308; *Ill. Cent. R. Co.* v. *Coley*, 89 S. W. Rep. 234; *Kansas City R. Co.* v. *Daughtry*, 138 U. S. 298; *Kansas City Belt Ry. Co.* v. *Herman*, 187 U. S. 63; *Louisville & N. R. Co.* v. *Wangelin*, 132 U. S. 599; *Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239; *Schwyhart* v. *Barrett*, 145 Mo. App. 332; *Stone* v. *South Carolina*, 117 U. S. 430; *Tex. & Pac. Ry. Co.* v. *Eastin*, 214 U. S. 153; *Underwood* v. *Ill. Cent. R. Co.*, 103 S. W. Rep. 322; *Wecker* v. *Nat. Enameling Co.*, 204 U. S. 176.

Apart from the allegations of negligence with which the resident defendant was charged, the petition contained other and distinct controversies between the plaintiff and the removing defendant. *Adderson* v. *Southern Ry. Co.*, 177 Fed. Rep. 571; *Barney* v. *Latham*, 103 U. S. 205; *Batey* v. *Nashville Ry. Co.*, 95 Fed. Rep. 368; *Beuitel* v. *Chicago & St. P. Ry. Co.*, 26 Fed. Rep. 50; *Boatmen's Bank* v. *Fritzlen*, 135 Fed. Rep. 650; *S. C.*, 212 U. S. 364; *Chicago & A. Ry. Co.* v. *N. Y., L. E. & N. R. Co.*, 24 Fed. Rep. 516; *Connell* v. *Smiley*, 156 U. S. 335; *Elkins* v. *Howell*, 140 Fed. Rep. 157; *Erb* v. *Popritz*, 59 Kansas, 264; *Ferguson* v. *Chicago, M. & St. P. Ry. Co.*, 63 Fed. Rep. 177; *Fraser* v. *Jennison*, 106 U. S. 191; *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428; *Gudger* v. *Western N. C. R. Co.*, 21 Fed. Rep. 81; *Gustafson* v. *Chicago, R. I. & P. Ry. Co.*, 128 Fed. Rep. 85; *Harter* v. *Kernochan*, 103 U. S. 562; *Hartshorn* v. *Atchison, T. & S. F. R. Co.*, 77 Fed. Rep. 9; *Henry* v. *Ill. Cent. R. Co.*, 132 Fed. Rep. 715; *Hoye* v. *Raymond*, 25 Kansas, 665; *Leavenworth, W. & S. Ry. Co.* v. *Wilkins*, 45 Kansas, 674; *M'Allister* v. *Ches. & O. R. Co.*, 198 Fed. Rep. 660; *McGuire* v. *G. Nor. R. Co.*, 153 Fed. Rep. 434; *Nichols* v. *Ches. & O. Ry. Co.*, 195 Fed. Rep. 913; *Southern Ry. Co.* v. *Edwards*, 115 Georgia, 1022; *Southern Ry. Co.* v. *Robbins*, 43 Kansas, 145; *Telegraph*

Co. v. *Vandervort*, 67 Kansas, 269; *Wheeling Creek Gas Co.* v. *Elder*, 170 Fed. Rep. 215; *Willard* v. *Spartanburg R. Co.*, 124 Fed. Rep. 796.

Among the other numerous decisions of this court construing the separable controversy provisions of the Federal Removal Act, see the cases cited *supra* and also *Balsley* v. *St. Louis, A. & T. H. R. Co.*, 119 Illinois, 68; *Central of Ga. Ry. Co.* v. *Brown*, 113 Georgia, 414; *Chicago & E. R. Co.* v. *Meech*, 163 Illinois, 305; *Chicago & G. T. Ry. Co.* v. *Hart*, 209 Illinois, 414; *Chicago & W. I. R. Co.* v. *Newell*, 212 Illinois, 332; *Cincinnati, N. O. & T. P. Ry. Co.* v. *Robertson*, 115 Kentucky, 858; *Davis' Admr.* v. *Chesapeake & O. Ry. Co.*, 116 Kentucky, 144; *Little* v. *Giles*, 118 U. S. 596; *McCabe's Admx.* v. *Maysville & Big Sandy R. Co.*, 112 Kentucky, 861; *Murray* v. *Cowherd*, 147 S. W. Rep. 6; *Pennsylvania Co.* v. *Ellet*, 132 Illinois, 654; *Schumfert* v. *Southern Ry. Co.*, 65 S. Car. 332; *Slaughter* v. *Nashville, C. & St. L. Ry. Co.*, 91 S. W. Rep. 744; *Southern Ry. Co.* v. *Grizzle*, 124 Georgia, 735; *Southern Ry. Co.* v. *Miller*, 57 S. E. Rep. 1090; *Winston's Admr.* v. *Ill. Cent. R. Co.*, 111 Kentucky, 954.

Mr. J. D. Houston, *Mr. E. C. Hyde*, *Mr. David Smyth*, *Mr. C. H. Brooks* and *Mr. F. S. Macy* for defendant in error:

A cause of action is alleged against defendant engineer where it is charged that he injured plaintiff by carelessly running his engine over him while handling same in the course of his duties as defendant's engineer, as this is a charge of misfeasance and not of mere nonfeasance. *Alabama R. R.* v. *Thompson*, 200 U. S. 206; *Charman* v. *Lake Erie Ry.*, 105 Fed. Rep. 449; *C., R. I. & P. Ry.* v. *Dowell*, 83 Kansas, 562; Cooley on Torts, 2d ed. (1888), p. 164; 31 Cyc. 1559; 38 *Id.* 726; *Davenport* v. *So. Ry.*, 135 Fed. Rep. 960–962; 1 Am. & Eng. Ency. Law, 1132; Gen'l Statutes Kansas, 1909 ed., §§ 5603, 5628, 5681; Meachem on Agency,

572; Notes to Cases, 25 L. R. A. (N. S.) 356; *Riser* v. *So. Ry.*, 116 Fed. Rep. 215; *Southern Ry.* v. *Miller*, 217 U. S. 209; 5 Words and Phrases, p. 4537, "Misfeasance."

Under the decisions of the Supreme Court of Kansas and the Kansas statutes the railway company and the defendant engineer were jointly and severally liable for the injury thus inflicted, and were properly joined as defendants in this case. *Arnold* v. *Hoffman*, 86 Kansas, 12; 31 Cyc. 1559; *Durand* v. *Railway Co.*, 65 Kansas, 380; Gen'l Stat. Kansas, 1909, §§ 5681, 5628, 5603; *Kansas City* v. *File*, 60 Kansas, 157; *Luengene* v. *Consumers*, 86 Kansas, 866, 876; *Southern Ry.* v. *Miller*, 217 U. S. 209; *W. & W. Ry.* v. *Beebe*, 39 Kansas, 465.

Even though the plaintiff misconceived his cause of action and had no right to prosecute the defendants jointly yet it does not even then become a separable controversy or removable if he attempted to join them in good faith. *Alabama Ry.* v. *Thompson*, 200 U. S. 206; *C., B. & Q. Ry.* v. *Willard*, 220 U. S. 413; *Dougherty* v. *Yazoo Ry.*, 122 Fed. Rep. 205; *Enos* v. *Ky. Distilling Co.*, 189 Fed. Rep. 342; *Jacobson* v. *C., R. I. & P. Ry.*, 176 Fed. Rep. 1004, Syl. 5; *Keller* v. *Ry.*, 135 Fed. Rep. 202; *McGarvey* v. *Butte Miner*, 199 Fed. Rep. 671.

Defendant employé was at least liable under the common law, and the railway company both at common law and under the statute; but the case is not thereby made removable nor the controversy separable. *Amer. Bridge Co.* v. *Hunt*, 130 Fed. Rep. 302; *Arnold* v. *Hoffman*, 86 Kansas, 12; *Brown* v. *Cox Bros.*, 75 Fed. Rep. 689, Syl. 2; *C., B. & Q. Ry.* v. *Willard*, 220 U. S. 413; *Charman* v. *Ry.*, 105 Fed. Rep. 449, 454; *Dougherty* v. *Yazoo Ry.*, 122 Fed. Rep. 205; *Hough* v. *So. Ry.*, 57 S. E. Rep. 469; *Hodges* v. *Railroad Co.*, 120 Fed. Rep. 712; *Jacobson* v. *Illinois Ry.*, 176 Fed. Rep. 1004; *Luengene* v. *Consumers*, 86 Kansas, 866, 876; *Painter* v. *Chicago Ry.*, 177 Fed. Rep. 517; *Southern Ry.* v. *Miller*, 217 U. S. 209.